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In the Supreme Court of the United States

OCTOBER TERM 1981

TRUMAN K. GIBSON, JR.,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

1. Was Gibson deprived of his liberty without due process of law because the State, in abuse of the grand jury process, obtained a grand jury indictment without presenting to the grand jury any evidence of criminal conduct by Gibson?

2. Was Gibson deprived of his right to the equal protection of the laws because the State deliberately chose to obtain criminal charges against him through the grand jury process, rather than affording Gibson the benefits of a preliminary hearing granted to other similarly situated individuals?

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PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner Truman K. Gibson, Jr., Defendant-Appellee in the court below, prays that a writ of certiorari issue to review a portion of the judgment entered in this case by the Supreme Court of Illinois.

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The proceedings in the court below involved the claims of the People of the State of Illinois, as plaintiff-appellant, and of Forest P. Whitlow, Joseph P. Delfino and Truman K. Gibson as defendants-appellees. In a related case, the People of the State of Illinois was plaintiff-appellee and James Marando was the defendant-appellant. Only Truman K. Gibson and the People of the State of Illinois are parties to these proceedings.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois, *People* v. *Whitlow*, 89 Ill. 2d 322 (1982), is printed in Appendix 1. The opinion of the Illinois Appellate Court, Third District, *People* v. *Whitlow*, 86 Ill. App. 3d 858 (3rd Dist. 1980), is printed in Appendix 2.

JURISDICTION

The opinion and judgment of the Supreme Court of Illinois were entered on February 19, 1982. The petition for rehearing of the State of Illinois was denied on March 25, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. The Indictment

On May 21, 1976, a Rock Island County, Illinois grand jury returned a twelve count indictment against Truman K. Gibson, Jr., an attorney at law, and four other men, Joseph Delfino, Forest Whitlow, John Brewer and James Marando. A copy of the indictment is printed in Appendix 3.

Though the charges in the indictment are detailed and seemingly complex, they may be simply and briefly summarized. Essentially, each of the twelve counts charged that Gibson and his co-defendants sold stock in the Royal National Mortgage and Investment Company (hereinafter "Royal National") and that, in selling the stock, they made false statements and omitted to inform the prospective purchasers of material matters relating to the stock and the company.

Counts I through V of the indictment charged the defendants with conspiracy and substantive violations of the Illinois securities laws, Ill. Rev. Stat. Ch. 121½, §§ 137.12(F), (G) and (I) and 137.14, arising out of the sales of Royal National stock. Counts VI through XII charged Gibson and his co-defendants with conspiracy and theft by deception arising out of the same conduct, in violation of Ill. Rev. Stat. Ch. 38, § 16-1(b)(1).

B. Pre-Trial Proceedings

During pre trial discovery, Gibson secured a copy of the complete grand jury testimony of investigator Bernard Hoffman, the only witness who testified before the grand jury. Review of the twelve page transcript of Hoffman's testimony revealed that Hoffman did

not implicate Gibson in any criminal conduct.* Hoffman's entire testimony relating to Gibson was that (1) Gibson was an incorporator of Royal National, (2) Gibson was secretary-treasurer of the company, (3) Gibson received a salary of approximately $34,000 from Royal National, and (4) Gibson was paid an additional $25,000 by the company for Gibson's interest in an allegedly nonexistent corporation. *See* Appendix 4, at App. 78, 81 and 84. Based on this testimony alone, the grand jury returned its twelve count indictment.

Gibson filed a pre-trial motion to dismiss the indictment on the grounds that (1) no evidence of any criminality or wrongdoing by Gibson was presented to the grand jury and (2) Hoffman was incompetent to testify because he was not sworn as a witness. Gibson's motion to dismiss was denied by the trial court. Gibson then filed a pretrial motion in the Supreme Court of Illinois for leave to file a petition for a writ of mandamus. That motion was denied on December 2, 1976.

C. The Trial

The trial of this case, conducted before a jury in May, 1977, lasted almost three weeks. The report of the trial proceedings consumed some 1,500 pages. Despite Gibson's repeated requests for a severance, the trial commenced with five defendants. Finally, after almost three weeks of trial, the trial court agreed that defendant Marando's defense was antagonistic to that of Gibson and the other defendants. Marando's case was severed and he later entered a guilty plea.

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* The entire transcript of the grand jury proceeding is printed in Appendix 4.

Although the prosecution called more than twenty witnesses at trial, most of the witnesses did not even mention Mr. Gibson in their testimony. Not one of the seven victims of the thefts alleged in Counts VII through XII who testified during the State's case stated that Gibson was involved in the sale of Royal National stock to them. Gibson's counsel played almost no role in the cross-examination of the State's witnesses.

Despite the paucity of evidence against Gibson, the jury returned guilty verdicts on all twelve counts against him and the remaining co-defendants. Judgment was entered against Gibson and his co-defendants on five counts of theft by deception and four counts of violating various provisions of the Illinois securities laws.* Mr. Gibson was sentenced to concurrent sentences of one to three years in prison on each of the nine counts and was fined a total of $20,000; the three co-defendants received the same term of imprisonment as Gibson.

Following the entry of judgment against him, Gibson was suspended from the practice of law by the Supreme Court of Illinois. The suspension lasted almost three years, from January 20, 1978 to September 30, 1980. The suspension was vacated by the Supreme Court after the Illinois Appellate Court reversed Mr. Gibson's conviction.

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* The trial judge granted Gibson's motion to vacate and dismiss the judgments entered upon Counts I, VI and XII. The order dismissing Counts I and VI was pursuant to Ill. Rev. Stat. Ch. 38, § 8-5, which mandates that judgment not be entered on substantive counts as well as a conspiracy count. Count XII was dismissed because the trial judge found that the count did not properly allege an offense.

D. The Appeals

On direct appeal by the convicted defendants, the Illinois Appellate Court, Third District, reversed Gibson's conviction and remanded the case for a new trial because it found that the cumulative effect of the state prosecutor's persistent misconduct deprived Gibson of his right to a fair trial. *People* v. *Whitlow*, 86 Ill. App. 3d 858, 869 (3d Dist. 1980). *See* Appendix 2, at App. 40. The court found prosecutorial misconduct in the jury *voir dire*, the prosecutor's opening statement, his presentation of evidence and, particularly, his closing argument. Though the court noted that "the greater portion of the prosecutorial misconduct was directed solely at the defendant Gibson," 86 Ill. App. 3d at 869, Appendix 2, at App. 40, it found that the misconduct also prejudiced Whitlow, Delfino and Brewer. Consequently, their convictions also were reversed and remanded for a new trial. *Id.*

Having determined that a new trial was required, the Appellate Court addressed several other issues raised by Gibson in his appeal, including Gibson's argument that his conviction should be reversed outright, with no remand for a new trial, because the State abused the grand jury process by obtaining an indictment against Gibson without presenting any evidence to the grand jury of criminal conduct by him. Phrasing the issue as one merely challenging the sufficiency of the evidence in support of the indictment, the Appellate Court concluded that the grand jury process was not abused and held that "this appellate court district adheres to the rule that sufficiency of evidence presented to a grand jury is not listed among the grounds for dismissal set forth in section 114-1(a)(1-10) of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1977, Ch. 38, par. 114-1(a)(1-10))." 86 Ill. App. 3d at 870, Appendix 2, at App. 42. The Appellate Court did

not address the fundamental constitutional issue raised by the facts of this case: when, as here, no evidence of criminal conduct by Gibson was presented to the grand jury, may the indictment stand?

The Supreme Court of Illinois affirmed the finding of the Appellate Court that the prosecutorial misconduct was so prejudicial to the defendants as to warrant a reversal of their convictions and a remand for a new trial. *People* v. *Whitlow*, 89 Ill. 2d 322, 341 (1982), Appendix 1, at App. 16. In addition, the Supreme Court upheld the Appellate Court's decision on the grand jury abuse question, noting that evidence of the defendants' illegal conduct could be inferred from the grand jury transcript and holding that a court should not inquire into the adequacy of grand jury evidence. 89 Ill. 2d at 331, Appendix 1, at App. 4. In reaching this decision, the Supreme Court linked the claims of defendants Gibson, Whitlow and Delfino together, failing to determine if the evidence against Gibson alone was sufficient to support his indictment.*

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* Applying the same form of analysis, the Supreme Court found the evidence presented at trial sufficient to support the jury's verdict. 89 Ill. 2d at 343, Appendix 1, at App. 17.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD RESOLVE THE IMPORTANT GRAND JURY QUESTION PRESENTED BY THIS CASE BECAUSE THE DECISION BY THE COURT BELOW IS CONTRARY TO CONSTITUTIONAL PRINCIPLES OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

INTRODUCTION

The sole issue presented in this petition is whether an indicted defendant is entitled to relief, for abuse of the grand jury process, when a State prosecutor obtains an indictment which is supported by *no* evidence of criminal conduct by the defendant. The question at issue here is one of first impression before this Court and, in light of the important due process and equal protection problems associated with an indictment supported by no evidence, is appropriate for review.

An examination of the testimony presented at the grand jury proceeding demonstrates that Gibson was indicted for numerous violations of the Illinois criminal law despite the fact that absolutely no evidence of any criminal conduct by him was presented to the grand jury. The State's sole witness before the grand jury, investigator Hoffman, referred to Gibson only four times during the course of his brief testimony, never implicating Gibson in any criminal acts. Indeed, Hoffman simply identified Gibson as an incorporator of Royal National, as secretary-treasurer of the company, and as the recipient of a salary from the company of approximately $34,000. *See* Appendix 4, at App. 78, 81. Hoffman also testified that Gibson was

paid an additional $25,000 for his interest in an allegedly non-existent corporation. *See* Appendix 4, at App. 84. Based on this testimony *and nothing more*, the grand jury's indictment charged Gibson with twelve violations of the criminal law.

The injustice caused Gibson as a result of his unsupported indictment becomes even more evident upon a review of the type of evidence that was *not* presented to the grand jury. For instance, no evidence was presented to the grand jury to indicate *in any way* that Gibson entered into an agreement with his co-defendants to violate the securities laws of Illinois as the indictment charged in Count 1. Count I charged twelve separate overt acts. No evidence was presented to the grand jury that any of the overt acts was committed. Gibson was named in three of these overt acts, but there was no basis in the grand jury proceedings for any of the allegations set forth in the overt acts.

Overt act number 8, for example, alleged that on June 11, 1973 defendants Whitlow, Delfino and Brewer signed Royal National check No. 1064 in the amount of $2,500 payable to Truman Gibson, but no evidence in support of this claim was presented to the grand jury. Overt act number 9 alleged that on July 30, 1973 defendants Whitlow and Brewer signed Royal National check No. 1134 in the amount of $5,000 payable to Truman Gibson. Again, the grand jury transcript was absolutely silent as to any evidentiary basis for this allegation. Finally, overt act number 12 alleged that Gibson and his co-defendants opened bank account number 617-441-9 at the Lake Shore Bank, but nothing in Mr. Hoffman's grand jury testimony supported this claim or any of the other alleged overt acts. There is simply no testimony or evidence of these matters

in the grand jury transcript. Yet, the grand jury allegedly found probable cause to believe that these events occurred and that they were in furtherance of a conspiracy.

Similarly, Counts II through V alleged various violations of the securities laws by Gibson, but nothing in Hoffman's grand jury testimony evidenced any violation of the securities laws by Gibson. Hoffman did not even state that Gibson had any knowledge as to the numerous means by which the stock was being sold. Finally, Hoffman presented no information to the grand jury which supported the theft by deception allegations in Counts VI through XII.

The instant case, therefore, presents this Court with one of the most extreme examples of the abuse of the grand jury process. Because it involves an indictment supported by no criminal conduct by the indicted defendant, the case demonstrates how easily the constitutional protections of due process can be violated during grand jury proceedings. In addition, the case illustrates how a State prosecutor, if given unbridled control over the grand jury process, can, in violation of the equal protection clause of the Fourteenth Amendment, discriminatorily choose to prosecute weak cases through the grand jury, and thereby deprive certain defendants, like Gibson, the benefits which a preliminary hearing affords to other similarly situated individuals. Accordingly, this petition provides an ideal case for the Court to consider what, if any, protections are to be given to the individual whose indictment is supported by *no* evidence of criminal conduct.

A.

THIS COURT SHOULD RESOLVE THE IMPORTANT QUESTION OF WHETHER AN INDICTMENT BASED UPON NO EVIDENCE OF CRIMINAL CONDUCT CONSTITUTES AN ABUSE OF THE GRAND JURY IN VIOLATION OF DUE PROCESS GUARANTEES.

In refusing to find an abuse of the grand jury process through the unsupported indictment returned against Gibson, the court below held that a trial court should not inquire into the adequacy of the evidence presented to a grand jury. *People* v. *Whitlow*, 89 Ill. 2d 322, 331 (1982). *See* Appendix 1, at App. 4. The court's ruling would not be subject to challenge if Gibson were merely contesting the sufficiency of the evidence presented to the grand jury. *See, e.g., Costello* v. *United States*, 350 U.S. 359, 363 (1956). Indeed, Gibson conceded in the courts below (and concedes here) that a grand jury indictment may be based on hearsay, *Costello* v. *United States, supra*, or on evidence that was illegally obtained. *United States* v. *Calandra*, 414 U.S. 338 (1974). Mr. Gibson does contend, however, that his indictment is invalid because it is not supported by any evidence of criminal conduct. Under these circumstances, the ruling of the Illinois Supreme Court is contrary to the generally accepted principles governing grand jury proceedings, as well as to holdings of the various federal courts which have considered this issue.

Historically, the primary function of the grand jury has been to determine if, based on the evidence presented by a prosecutor, probable cause exists that the alleged offender is guilty of the offense charged. In this regard, this Court has considered the grand jury to be:

> "[A] primary security to the innocent against hasty, malicious and oppressive prosecution; it serves the

> invaluable function in our society of standing between the accuser and the accused, . . ., to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will."

Wood v. *Georgia*. 370 U.S. 375 390 (1962). Consistent with these general principles based upon the essential requirement of probable cause, a grand jury indictment can not be allowed to stand where there is *no* evidence to support it.

The Illinois Supreme Court's decision is in conflict with the decisions of numerous other courts which have held that an abuse of the grand jury process occurs when the State procures an indictment that is not supported by any evidence of criminal conduct. For example, in *United States* v. *Costello*, 221 F.2d 668, 677 (2d Cir. 1955), Judge Learned Hand articulated the rule that ". . . if it appeared that no evidence had been rationally established by the facts, the indictment ought to be quashed; because then the grand jury would have in substance abdicated." Judge Hand's view was formally adopted by Justice Burton who, in concurring in this Court's affirmance of the lower court's decision in *Costello*, noted that:

> "[I]f it is shown that the grand jury had before it no substantial or rationally persuasive evidence upon which to base its indictment, that indictment should be quashed. To hold a person to answer to such an empty indictment for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen."

Costello v. *United States*, 350 U.S. 359, 364 (1956) (Burton, J., concurring).

In *Brady* v. *United States*, 24 F.2d 405 (8th Cir. 1928), the court reversed a conviction for conspiracy to use the

mails in furtherance of a scheme to defraud. The reversal was ordered because there was no evidence presented to the grand jury of one element of the criminal charge. In *Brady*, the court found that there was no evidence before the grand jury that the defendants used the mails in executing the scheme to defraud, an essential element of the offense charged. Under these circumstances, the court held that the indictment must be quashed. As the court explained:

> "The doctrine that a grand jury may indict without evidence, if tolerated, would establish a precedent subversive of the liberty of the citizen, and his safety and security, and the good name and fame of any innocent person might at any time be blasted."

24 F.2d at 408 (quoting from *People* v. *Price*, 2 N.Y.S. 414, 416 (1878), *aff'd* 119 N.Y. 650 (1890)). While *Brady* merely involved a failure to present evidence on one element of the offense, in this case no evidence of any criminal conduct whatsoever was presented to the grand jury against Mr. Gibson. Accordingly, this case involves an even more serious due process violation than that which the court found to exist in *Brady*.

In *United States* v. *Tane*, 329 F.2d 848 (2d Cir. 1964), a court again ordered the dismissal of an indictment not supported by any evidence of criminal conduct. There, the only evidence presented to the grand jury resulted from illegal wiretapping and, once this evidence was suppressed, there existed no evidence of criminal conduct. In reaching its decision, the court stated the general principle, relied upon herein by the court below, that a defendant has no right to have an indictment dismissed merely because incompetent or inadequate evidence was presented to the grand jury. 329 F.2d at 853. However, the court recognized that a different issue is raised, permitting an indictment to be dismissed, when a defendant claims that

his indictment was supported by *no* evidence. As the court held:

> "As long as there is some competent evidence to sustain the charge issued by the Grand Jury, an indictment should not be dismissed. Here, the government concedes that the indictment rested almost exclusively on the testimony of (the informant) and that dismissal of the indictment was proper if (the informant's) testimony could not be used. In light of this concession, dismissal of the indictment could hardly be termed an abuse of discretion."

Id. at 853-54 (citations omitted).

In a case remarkably similar to the instant case, *United States* v. *O'Shea*, 447 F. Supp. 330 (S.D. Fla. 1978), the court dismissed an indictment for conspiracy to import marijuana because, based on its own independent review of the grand jury transcripts, it found no evidence of any criminal conduct by one of the named co-conspirators. In justifying its decision, the court, as did the court in *Tane*, recognized a distinction between a challenge to an indictment on the ground of insufficient or inadequate evidence, and one based on no evidence. 447 F. Supp. at 332. Acknowledging the grand jury's dual purpose of protecting the innocent accused and assuring indictments based on evidence of probable cause, the court stated that a trial court "must have the authority and power to inquire into and review the proceedings of a grand jury." *Id.* Otherwise, according to the court, the charge "to the grand jury as to its functions, duties and responsibilities would be worthless, indeed a judicial farce." *Id.* As the court concluded:

> "The grand jury is a great institution which has been the guardian of the people since it was created at Runnymede. Although there is abroad in this land today a movement for its elimination, it is the view of the

> undersigned that every possible effort should be made for its preservation. Those who favor its abolition argue that the prosecutor controls the grand jury; that he decides what the grand jury will hear, how much it will hear and when it will hear it; and that he decides the quantum as well as the quality of the evidence submitted for the grand jury's consideration; and in sum, that the prosecutor totally dominates and controls the Grand Jury. *If the Grand Jury system is to survive, its intended purpose must not be prostituted* (emphasis added).

Id.

Thus, the decision of the court below, finding no abuse of the grand jury process, is in conflict with decisions of other courts which have directly considered the issue. This Court should grant certiorari to resolve the question of whether an indictment should be dismissed when, in abuse of the grand jury process, it is supported by *no* evidence of criminal conduct against the indicted defendant.

B.

THIS COURT SHOULD RESOLVE THE IMPORTANT QUESTION OF WHETHER A PROSECUTOR'S DECISION TO OBTAIN CRIMINAL CHARGES OF A WEAK CASE THROUGH THE GRAND JURY PROCESS, RATHER THAN AFFORDING A POTENTIAL DEFENDANT THE BENEFITS OF A PRELIMINARY HEARING, VIOLATES EQUAL PROTECTION GUARANTEES.

In the court below, Gibson contended that his constitutional right to the equal protection of the laws was violated by the State's decision to obtain criminal charges against him through the restrictive grand jury process, rather than by proceeding through a preliminary hearing. Gibson argued that a preliminary hearing affords a potential defendant certain rights—such as the right to appear and argue no probable cause and the right to confront and

cross-examine witnesses—that are not provided by the grand jury process. Under these circumstances, Gibson claimed that it was an abuse of the grand jury process and a denial of equal protection for the prosecutor to have deliberately chosen to prosecute the extremely weak and unsupported case against him through the grand jury, rather than affording him the benefits of a preliminary hearing like other similarly situated individuals. The opinion of the court below does not address this issue; it is thus presumed that the court rejected Gibson's claims.

It generally has been held that a prosecutor has considerable discretion in deciding whether and in which forum to prosecute a potential criminal defendant. *Oyler* v. *Boles*, 368 U.S. 448 (1962). However, such prosecutorial discretion is not to be left unbridled and must be limited by constitutional protections. Indeed, a prosecutor may not base his decision to prosecute individuals on arbitrary and improper classifications. *See, e.g., United States* v. *Neary*, 552 F.2d 1188, 1195 (7th Cir.), *cert. denied*, 434 U.S. 864 (1977); *United States* v. *Scott*, 521 F.2d 1188, 1195 (9th Cir. 1975); *United States* v. *Berrigan*, 482 F.2d 171, 174 (3d Cir. 1973).

Allowing a prosecutor unfettered discretion to prosecute inherently weak cases against certain individuals, like Gibson, through the restrictive grand jury process, rather than affording them the benefits provided similarly situated individuals at preliminary hearing, unconstitutionally subjects the certain individuals to the whim of the prosecutor, denying them their right to equal protection under the Fourteenth Amendment. *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *United States* v. *Falk*, 479 F.2d 616, 624 (7th Cir. 1973). Gibson has suffered such a deprivation of his equal protection rights by the indictment obtained against him in this case.

Mr. Gibson has been under the cloud of an unsupported indictment for over six years. He was suspended from the practice of law for almost three years. Now, he is faced with the prospect of a new trial on an indictment which is not supported by any evidence of criminal conduct by him. In view of the important constitutional question raised herein, this Court should grant certiorari in this case.

CONCLUSION

For all of the reasons stated herein, petitioner Truman K. Gibson, Jr. respectfully prays that this Court grant a writ of certiorari to review a portion of the judgment of the Supreme Court of Illinois in this case.

Respectfully submitted,

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Dated: May 24, 1982

APPENDIX 1

(No. 53827, 53872 cons. — Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. FOREST P. WHITLOW *et al.* (James Marando, Appellant). — THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. FOREST P. WHITLOW *et al.* (Forest P. Whitlow *et al.*, Appellees).

Opinion filed February 19, 1982. — Rehearing denied March 25, 1982.

JUSTICE MORAN delivered the opinion of the court:

Defendants, Forest P. Whitlow, John L. Brewer, Joseph P. Delfino, Truman K. Gibson, Jr., and James Marando, were charged in a 12-count indictment with conspiracy, theft and violations of sections 12 and 14 of the Illinois Securities Law of 1953 (Ill. Rev. Stat. 1973, ch. 121½, pars. 137.12(F), (G), (I), 137.14). A jury in the circuit court of Rock Island County found defendants Whitlow, Brewer, Delfino and Gibson guilty on all counts. The trial judge vacated the jury's verdict on counts I and VI, the conspiracy counts, on the ground that a defendant cannot be convicted for both the inchoate and substantive offenses. The verdict on count XII was vacated because it did not properly allege an offense. Judgment was entered on the remaining nine counts. Each of these defendants was sentenced to concurrent terms of not less than one nor more than three years' imprisonment on each count. Gibson was additionally fined $20,000.

Marando's case was severed during trial due to conflicts between his defense and that of the other defendants. He

pleaded guilty to counts II through V, and the remaining counts were dismissed on a motion by the State. Marando was sentenced to concurrent terms of not less than one nor more than three years' imprisonment on each count.

The appellate court consolidated the cases for review, and affirmed Marando's conviction. With respect to the other defendants, it reversed and remanded the cause for a new trial due to prosecutorial misconduct. (86 Ill. App. 3d 858.) We granted leave to appeal to defendant Marando in cause No. 53827 and to the People in cause No. 53872.

The State raises one issue on appeal: Did prosecutorial misconduct prejudice the defendants and thereby make a fair trial impossible? In their cross-appeal, defendants Gibson, Whitlow and Delfino raise the following questions: (1) Was the grand jury process abused? (2) Should the indictment be held void? (3) Was the evidence insufficient to support the jury's guilty verdict? In his separate appeal, Marando contends that the indictment was void because it failed to allege a necessary element of the securities law offenses. This issue was raised for the first time on appeal, but he asserts that it involves a jurisdictional defect and therefore can be raised at any time. Defendant Brewer died, and the appeal has been dismissed as to him.

Count I of the indictment charged defendants with conspiracy to violate the securities law. Counts II through V alleged various violations of the securities law. Defendants were charged in Count VI with conspiracy to commit theft. Counts VII through XII alleged that defendants committed theft by deception in violation of section 16—1(b)(1) of the Criminal Code of 1961 (Ill. Rev. Stat. 1973, ch. 38, par. 16—1(b)(1)). The indictment basically alleged that, in selling stock in the Royal National Investment and Mortgage Corporation (Royal National), defen-

dants made false statements and did not inform prospective purchasers of material matters relating to the company and the stock. All of the defendants were officers and directors of Royal National with the exception of Marando, who was a commissioned salesman. Gibson, a lawyer, served as corporate counsel.

The evidence disclosed that, subsequent to the incorporation of Royal National, Marando solicited purchasers of the company's stock. The prospective purchasers were informed that the corporation intended to promote a sludge project, which involved the acquisition and transportation to the Bahama islands of processed wastes for use as fertilizer. Other corporate ventures included the training of Bahamians for employment, the establishment of a scholarship search program and the development of lithographic blankets.

The company's stock sold at $1 per share, and most purchasers acquired 10,000 shares. A number of witnesses testified that they were informed the stock would go public in the near future and sell over the counter at $5 per share. In fact, the company dissolved in a few years without going public. Various witnesses also testified that defendants claimed they each invested $50,000 in the corporation, when in fact only $220 was contributed by one defendant.

Additional evidence showed that the corporation was financed almost solely by proceeds realized from the stock sales. Between March and July of 1973, over 60% of the money acquired was disbursed to the defendants, although they had claimed they received no salaries from the corporation.

Defendants Gibson, Whitlow and Delfino first contend, in their cross-appeal, that the grand jury process was

abused because the sole witness appearing before the grand jury was unsworn. We disagree. The transcript does not indicate whether or not the witness was sworn. Therefore, this is not a case where it is clear that the grand jury was presented with unsworn testimony. There is a presumption that an indictment returned by a legally constituted grand jury is valid, and it is sufficient to justify a trial of the charge on the merits. (See *People* v. *Jones* (1960), 19 Ill. 2d 37, 43.) Defendants have indicated no circumstances which would overcome this presumption. They merely assert that the transcript fails to state the witness was sworn. In the absence of any evidence to the contrary, we must presume that the grand jury foreman properly administered the oath, as required by law. Ill. Rev. Stat. 1975, ch. 38, par. 112—4(c).

Defendants further assert that the grand jury process was abused because no evidence of criminal conduct was presented to the grand jury. A review of the grand jury transcript indicates that evidence was presented from which defendants' illegal conduct could be inferred. Additionally, there are numerous cases to the effect that a court will not inquire into the adequacy of the evidence. (*E.g.*, *People* v. *Creque* (1978), 72 Ill. 2d 515, 522.) If it were otherwise, "a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment." *Costello* v. *United States* (1956), 350 U.S. 359, 363, 100 L.Ed. 397, 402, 76 S. Ct. 406, 408-09.

In their cross-appeal, defendants Gibson, Whitlow and Delfino raise a number of contentions which they assert require dismissal of the indictment. First, they allege that counts II through V of the indictment should have been

dismissed because they fail to state an offense. Specifically, they claim that these counts fail to allege specific intent to defraud as an element of securities law violations.

The statute under which defendants were convicted provides, in relevant part:

> "Sec. 12. Violation. It shall be a violation of the provisions of this Act for any person:
>
> * * *
>
> F. To engage in any transaction, practice or course of business in connection with the sale or purchase of securities which works or tends to work a fraud or deceit upon the purchaser or seller thereof;
>
> G. To obtain money or property through the sale of securities by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading;
>
> * * *
>
> I. To employ any device, scheme or artifice to defraud in connection with the sale or purchase of any security, directly or indirectly." Ill. Rev. Stat. 1973, ch. 121½, pars. 137.12(F), (G), (I).
>
> "14. Sentence. * * *
>
> B. Any person who violates any of the provisions of sub-sections E, F, G, H, I, and J of Section 12 of this Act shall be guilty of a Class 4 felony." Ill. Rev. Stat. 1973, ch. 121½, par. 137.14(B).

The State asserts that these provisions do not mention, and therefore do not require, any mental state on the part of individuals accused of violating the statute. Consequently, it is argued that the legislature intended that securities law violations be absolute liability offenses.

Section 4—9 of the Criminal Code of 1961 (Ill. Rev. Stat. 1973, ch. 38, par. 4—9) provides:

> "A person may be guilty of an offense without having, as to each element thereof, one of the mental states described in Sections 4-4 through 4-7 if the offense is a misdemeanor which is not punishable by incarceration or by a fine exceeding $500, or the statute defining the offense *clearly indicates a legislative purpose to impose absolute liability* for the conduct described." (Emphasis added.)

Absolute liability cannot apply in this case since the offenses charged are felonies, unless the legislature clearly indicates the intent to impose it. The securities law provisions in question are silent as to the required mental state. However, it has been held that "[t]he mere absence of express language describing a mental state does not *per se* lead to the conclusion that none is required." (*People* v. *Valley Steel Products Co.* (1978), 71 Ill. 2d 408, 424.) There is no indication that the legislature intended to impose absolute liability for securities law offenses. Indeed, the harshness of potential penalties for these violations militates against such a conclusion.

When the statute does not prescribe a mental state, and the offense does not involve absolute liability, "any mental state defined in Sections 4—4, 4—5 or 4-6 is applicable." (Ill. Rev. Stat. 1973, ch. 38, par. 4—3(b).) These sections refer to intent, knowledge and recklessness. Therefore, it is necessary to determine which of these mental states should apply to securities law violations.

This court has not previously ruled on this issue. However, section 17 of the antifraud provisions of the Securities Act of 1933 (Act) (15 U.S.C. sec. 77q(a) (1976)) is closely analogous to the Illinois provisions and has been construed by the Federal courts. The Act provides:

"(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Section 24 of the Act contains the applicable penalty provision and provides that "[a]ny person who *wilfully* violates any of the provisions of this title *** shall upon conviction be fined not more than $10,000 or imprisoned not more than five years, or both." (Emphasis added.) 15 U.S.C. sec. 77x (1976).

A number of Federal cases have held that fraudulent or specific intent is necessary in order to obtain a criminal conviction under the Act. (See *United States* v. *Vasilios* (5th Cir. 1979), 598 F.2d 387, 392; *United States* v. *Vandersee* (3d Cir. 1960), 279 F.2d 176, 179.) However, the courts appear to require intent at least partly because the penalty provision in the Act employs the term "wilfully." (See *United States* v. *Brown* (9th Cir. 1978), 578 F.2d 1280, 1283-84.) No such qualifying language appears in the comparable Illinois provision. Further, a recent case indicates that either recklessness or knowledge will sus-

tain a conviction for securities fraud. *United States* v. *Farris* (9th Cir. 1979), 614 F.2d 634, 638.

In *Aaron* v. *Securities & Exchange Com.* (198[illegible]), 446 U.S. 680, 64 L. Ed. 2d 611, 100 S. Ct. 1945, a civil case, the Supreme Court addressed the issue of which mental state is required to enjoin violations of the Act. The court concluded that under section 77q(a)(1), *scienter* is an essential element of the offense. It was defined as "a mental state embracing intent to deceive, manipulate, or defraud." (446 U.S. 680, 686 n.5, 64 L. Ed. 2d 611, 620 n.5, 100 S. Ct. 1945, 1950 n.5.) Although *scienter* was thus defined with reference to intent, the court indicated that the term also includes knowledge. "The language of section 17(a)(1), which makes it unlawful 'to employ any device, scheme, or artifice to defraud,' plainly evinces an intent on the part of Congress to proscribe only *knowing or* intentional misconduct." (Emphasis added.) (446 U.S. 680, 696, 64 L. Ed. 2d 611, 626, 100 S.Ct. 1945, 1955.) In fact, the court did not rule out the possibility that even reckless conduct may suffice for a conviction under the Act.

We adopt the reasoning of the Supreme Court and hold that *scienter* is an essential element of the offense under our analogous section 12(I) (Ill. Rev. Stat. 1973, ch. 121½, par. 137.12(I)). This term embraces intentional or knowing misconduct. Since the indictment in the instant case charged the defendants with knowing and deliberate violations, it did not fail to allege a necessary element of the offense.

With respect to the requisite mental state under sections 17(a)(2) and (3), analogous to our sections 12(F) and (G), the *Aaron* court concluded that *scienter* was not a necessary element of the offense. (446 U.S. 680, 697, 64 L. Ed. 2d 611, 626, 100 S.Ct. 1945, 1956.) Hence, proof

of culpability is not required to sustain a conviction under those provisions. We find it unnecessary to determine whether a lesser mental state is applicable to sections 12(F) and (G). Defendants were charged with "knowingly" or "deliberately" committing the offenses, and knowledge is the most that would be required. Further, the jury instruction required that defendants be found guilty if they acted wilfully, knowingly, or deliberately. (See *Tallman* v. *United States* (7th Cir. 1972), 465 F.2d 282.) Therefore, the indictment is not void for failure to state the necessary elements of the offense charged.

This same reasoning applies to Marando's separate appeal challenging the indictment. Having determined that the requisite mental state was alleged therein, we need not consider whether the defendant waived this issue by pleading guilty to the securities law counts.

Defendants Gibson, Whitlow and Delfino next contend that counts II through V of the indictment fail to state an offense because the alleged purchasers of the securities are not named therein. It has been held that where the gravamen of the offense is the unlawful act itself, the indictment need not identify the purchaser. (*People* v. *Adams* (1970), 46 Ill. 2d 200, 203.) Similarly, in a forgery case, where the elements of the crime were sufficiently alleged, it was held unnecessary to aver intent to defraud a specific person. (*People* v. *Crouch* (1963), 29 Ill. 2d 485, 489.) In the instant case, the elements of the offense were sufficiently alleged, and thus failure to name the purchasers is not fatal to the validity of the indictment.

Defendants further argue that counts IV and V should be dismissed because they are duplicitous. "Duplicity" has been defined as the joinder of separate offenses in a single count of the indictment. (*People* v. *Ross* (1961), 21 Ill. 2d 419, 420-21.) Specifically, defendants point out that

sections 12(F) and (I) are phrased disjunctively. The indictment charging violations of these provisions is phrased in the conjunctive, as the word "and" is substituted for the term "or" which appears in the statute. This distinction does not render the counts duplicitous. "When a penal statute mentions several acts disjunctively and prescribes that each shall constitute the same offense and is subject to the same punishment, all or any of such acts may be charged conjunctively as constituting a single offense." *People* v. *Dickelmann* (1937), 367 Ill. 372, 386.

Similarly, counts II and III of the indictment are not void for vagueness or duplicity. Defendants were sufficiently apprised of the charges against them, and it is unnecessary that each alleged misrepresentation and omission be set out as a distinct offense. The indictment did not lack the necessary certainty to charge an offense.

Finally, defendants assert that counts VII through XI should be dismissed because they fail to allege the means by which the thefts were committed. The counts in question charged defendants with theft by deception in the language of the statute. An indictment which charges an offense in the statutory language "is deemed sufficient when the words of the statute so far particularize the offense that by their use alone an accused is apprised with reasonable certainty of the precise offense with which he or she is charged." (*People* v. *Patrick* (1967), 38 Ill. 2d 255, 258.) In the instant case, the statute clearly specifies the acts constituting the offense. (See *People* v. *Kamsler* (1966), 67 Ill. App. 2d 33.) Section 16—1 of the Criminal Code of 1961 (Ill.Rev.Stat. 1973, ch. 38, par. 16—1) provides, in part:

"A person commits theft when he knowingly:

* * *

(b) Obtains by deception control over property of the owner; [and]

* * *

(1) Intends to deprive the owner permanently of the use or benefit of the property."

The only potentially vague terms in the statute, "deception" and "obtains control," are defined in sections 15—4 and 15—8 of the Criminal Code of 1961 (Ill. Rev. Stat. 1973, ch. 38, pars. 15—4, 15—8). Since the statute sufficiently defines the offense, the State need not allege specific acts indicating a violation of the statute. *People* v. *Aud* (1972), 52 Ill. 2d 368, 370; *People* v. *Peters* (1957), 10 Ill. 2d 577, 580.

The State contends, in its appeal, that any instances of prosecutorial misconduct which may have occurred during trial are insufficient to warrant a new trial. The first alleged instance of misconduct occurred during *voir dire* of the jury. Defendants expressed a concern that one of the accepted jurors, Mrs. Hicks, made certain misrepresentations at her *voir dire* examination. As a result, the court conducted a further examination of the juror in chambers. During the judge's questioning, the prosecutor interrupted and stated: "I think it should be clear that it is not the People, Your Honor, asking these questions." Mrs. Hicks was subsequently selected as forewoman of the jury. We agree with the defendants that this comment was an improper attempt to prejudice the juror against defendants. Apparently, the prosecutor made this statement to advise Mrs. Hicks that he was not responsible for her discomfort.

In his opening statement, the prosecutor informed the jury that the investors were told their money would partly be used to build condominiums. Seventeen of the State's witnesses were investors in Royal National, and none of them testified about any possible condominium project.

The only evidence adduced at trial which is at all related to the prosecutor's statement was the testimony of witness Westercamp. He indicated that representations were made to him concerning the company's desire to acquire money for mortgage purposes. According to Westercamp, reference was made to a housing project in the Bahama islands that might require mortgage money. This evidence, standing alone, is insufficient to support the State's allegation.

Again in his opening statement, the prosecutor argued a fact upon which no evidence was produced. The State told the jury that the investors were not informed of certain matters which would have influenced their decision as to whether to purchase the stock. In this context, the prosecutor commented that "[t]hey [the investors] were never told that the one legitimate bill ever incurred by Royal National, a bill to send somebody to the Bahamas to see if some of these projects might be feasible, a bill for approximately $2,500, a bill amounting to not even one percent of the total income of Royal National never was paid and goes unpaid to this date." The bill to which the State referred was due to Dr. Bauer, a consulting engineer, for his advice as to the feasibility of the sludge operation. The amount was $1,500, not $2,500. More importantly, evidence showed that this bill was incurred after the last shares of stock were sold. Thus, as defendants assert, they could not have informed prospective purchasers about a bill they had not yet incurred. For this reason, the prosecutor's allegation was improper.

Defendants cite, as a further instance of misconduct, the State's direct examination of its witness, Mr. Streeter. Marando allegedly made misrepresentations to Mr. and Mrs. Streeter. The State initially called Mrs. Streeter to

the stand, and she testified at length as to the facts and circumstances of the alleged false statements. The State then conducted a direct examination of Mr. Streeter. His sole testimony was as follows:

> "Yeah, I told him [defendant Marando] I didn't have the money to invest and I was strapped and then I started the story a few years before that I lost my daughter and I had an insurance policy on her since she was a little girl and she left two little girls and I had that $10,000 life insurance policy so I asked him if it was a good place to invest it for these two little girls and he said it was and so that is where the $10,000 went."

Defendants moved for a mistrial or, in the alternative, that the testimony be stricken. The trial court denied both motions, though it admonished the prosecutor "to try and refrain from what verges on somewhat inflammatory testimony."

The prejudicial effect of the quoted testimony outweighs any possible probative value. The State knew what the witness would say on direct examination, and the elicited testimony was clearly designed to inflame the jury. It has been held that "[i]t is improper for the prosecutor to do or say anything in argument the only effect of which will be to inflame the passion or arouse the prejudice of the jury against the defendant without throwing any light on the question for decision." (*People* v. *Dukes* (1957), 12 Ill. 2d 334, 342-43.) This is equally applicable to the examination of witnesses.

Finally, defendants assert that the prosecutor made improper and prejudicial comments during his closing argument. One alleged prejudicial statement concerned the office space rented by Royal National. Evidence showed that in 1971 defendant Gibson rented the premises in question for use as his law offices. In May of 1973, Royal

National shared the office space with Gibson, at which time the rent payments increased by approximately $400. With reference to the rental, the prosecutor stated:

> "What about their offices? * * * I won't for a minute stand here and tell you that a company doesn't need offices but I will tell you that when rent jumps $400 a month for the same space at 625 North Michigan Avenue in Chicago, something is wrong and you can look at the ledger sheets yourself and find out how much Truman Gibson was getting during the time he was associated with this company to pay his rent. Where was that extra $400 a month going? *I submit to you it was going in Mr. Gibson's pocket.*" (Emphasis added.)

It can hardly be disputed that the State inferred defendant Gibson committed theft. This allegation is totally unsupported by any evidence from which the inference could be derived. This error is compounded by the fact that the State had reason to know its allegation was false. There is evidence in the record that the State was informed the rental charge for the premises did not materially increase when Royal National commenced to share the office space with Gibson. Further, all rent payments were submitted by the company directly to the landlord, Tuesday Publications. Gibson received no money therefrom.

Prior to trial, defendants made motions *in limine* to prevent the State from inquiring into their past criminal activity and any unrelated pending charges. This motion was granted. Nevertheless, in its rebuttal argument, the State made questionable references to defendants' backgrounds. With reference to Gibson, the prosecutor commented that "[m]aybe *this time* he will get caught." (Emphasis added.) The inference is that Gibson swindled people on prior occasions and was not "caught." Follow-

ing this comment, the prosecutor stated: "How many other corporations was he using? How many other shareholders? How much more money was he taking * * *?" With reference to defendants Whitlow and Delfino, the prosecutor made the following comment: "They know that if you pay five hundred bucks to R. Wayne Everett and Company you can get a list of the people who have been taken before * * * and you can tell them a bunch of stories and you know they will fall for it because they have fallen for it before." Again, this comment implies that defendants had previously engaged in illegal conduct.

With regard to Gibson's promotion of the sludge operation, the prosecutor stated:

> "What this says I believe is that these projects were truly projects of Truman Gibson and had they gone anywhere at all, the shareholders of Royal National might as well have jumped in the Mississippi River because Truman Gibson was going to be on the gravy train and they were going to have to sit around and split up shares of a company that had been dissolved in 1974."

The quoted comment involves an expression of the prosecutor's own belief. This court has consistently held that it is improper for the prosecutor to express his own opinion as to the defendant's guilt. (*E.g., People* v. *Monroe* (1977), 66 Ill. 2d 317, 324.) Further, this comment, as well as other cited statements made by the prosecutor, was not based upon any evidence. A "fact not based upon evidence in the case may not properly be argued to the jury * * *." *People* v. *Beier* (1963), 29 Ill. 2d 511, 517.

Reversible error exists where there are reasonable grounds for believing the jury was prejudiced by the improper remarks. (*People* v. *Allen* (1959), 17 Ill. 2d 55, 63.) In light of the numerous instances of misconduct which

occurred throughout the trial, it is unnecessary to assess the prejudicial effect of each isolated comment. We find that the cumulative impact of the statements may well have prejudiced the jury and constituted a material factor leading to the defendants' convictions. Under these circumstances, defendants Whitlow, Gibson and Delfino are entitled to a new trial. See *People* v. *Dukett* (1974), 56 Ill. 2d 432, 443.

The State asserts that we should not consider many of these alleged instances of misconduct because the defendants failed to make timely objections to the comments. When a defendant fails to object at trial, any errors in the proceedings are ordinarily deemed waived. (*People* v. *Jackson* (1981), 84 Ill. 2d 350, 358.) However, this rule is not absolute. A reviewing court may consider errors which affect substantial rights (73 Ill. 2d R. 615(a)), or which, as in this case, are sufficiently prejudicial to deny defendant a fair trial. (*People* v. *Sullivan* (1978), 72 Ill. 2d 36, 42.) Further, defendants did make timely objections to many of the improper comments.

The State next contends that, even if the comments were prejudicial, they constituted harmless error in light of the overwhelming evidence of the defendants' guilt. It has been held that improper comments may warrant a reversal of the conviction, even where there is considerable evidence against the accused. (See 72 Ill. 2d 36, 44; *People* v. *Weathers* (1975), 62 Ill. 2d 114, 120.) This is especially true where many of the remarks were extremely prejudicial, deliberately made, and the primary evidence against defendants was circumstantial. See 72 Ill. 2d 36; 62 Ill. 2d 114.

Finally, the State asserts that most of the prejudicial statements were directed solely at defendant Gibson; therefore, the other defendants should not be entitled to

a new trial. We disagree. The defendants were tried jointly on both conspiracy and substantive charges, and an "accountability" instruction was tendered to the jury. Thus, the State's theory involved the responsibility of each defendant for the acts of his codefendants. Under these circumstances, improper remarks directed at one defendant were likely to be considered by the jury as evidence against all of them. Further, certain comments made by the prosecutor were directed at each of the defendants.

The final issue raised by defendants Gibson, Whitlow and Delfino is whether the evidence was totally insufficient to support the jury's guilty verdict. It is necessary to review this question since the cause will be remanded for a new trial. (See *People* v. *Taylor* (1979), 76 Ill. 2d 289, 309.) Defendants allege that the evidence was insufficient because it was entirely circumstantial and did not exclude every reasonable hypothesis of innocence. However, there was some direct evidence presented against each defendant. Whitlow and Delfino allegedly made numerous misrepresentations to a number of witnesses. Gibson attended stockholder meetings at which he introduced speakers, some of whom provided the investors with false information. He did nothing to correct or clarify false statements made in his presence. In addition, all defendants drew salaries from the corporation, contrary to representations made to the shareholders. Thus, our review of the record indicates that there was sufficient evidence upon which the jury could conclude, as it did, that the defendants were guilty.

For the reasons stated herein, the judgment of the appellate court, affirming Marando's conviction and reversing and remanding for a new trial for defendants Whitlow, Delfino and Gibson, is affirmed.

Judgment affirmed.

JUSTICE UNDERWOOD, dissenting:

The defendants were found guilty of all charges in a 12-count indictment at the conclusion of a lengthy and complex trial in which the evidence of guilt is overwhelming. I cannot agree with the majority opinion which now reverses those convictions on the basis of alleged prosecutorial misconduct consisting of isolated comments, most of which were unobjected to, and many of which were legitimate inferences with substantial evidentiary support. Unfortunately, my reasons for dissenting cannot be adequately stated in other than extended form.

Most of the allegedly improper remarks occurred during the State's rebuttal argument. Of the many rebuttal remarks cited by the majority as error, the only one preserved for review by timely objection concerned Royal National's rental arrangements and the prosecutor's allegation that $400 a month was "going in Mr. Gibson's pocket." The majority states that the allegation is "totally unsupported" by any evidence (89 Ill. 2d at 340), and that the error is compounded because there is evidence in the record which shows the State had reason to know its allegation was false. The evidence to which the majority refers is an affidavit of W. Leonard Evans, president of Gibson's landlord, Tuesday Publications, which was submitted after trial in support of defendant Gibson's post-trial motion. Evans states that the rental payments for Gibson's law office did not materially increase when Royal National began to share the space, and that he informed a representative of the State of this fact prior to trial. He further states that had he been asked he would have denied the allegation that Gibson received any portion of the rent paid by Royal National. In contrast to

Evans' statement, the ledger sheets of Tuesday Publications, stipulated into evidence, at all times show Gibson as the sole tenant, but conclusively demonstrate that the rental payments increased more than $350 a month when Royal National also began to use Gibson's law office. During the period when the space was shared, Royal National paid the entire rent, approximating $625 per month. When Royal National ceased sharing the space, the rent which Gibson resumed paying returned to approximately $275 per month. Evans claimed, however, that the rent was always $600 per month, and his explanation regarding the discrepancy was that Gibson could not afford to pay the entire $600 per month when he had to pay his own rent, and because of his past relationship with the company, he was allowed to pay a lesser amount with the understanding that he would pay the deficiency when he was financially able to do so.

The irregular rent pattern lends support to the prosecutor's assertion that something was amiss. Although the State's allegation was refuted in part by Evans' post-trial affidavit, I am not convinced that the State was required to accept Evans' unlikely explanation of the irregularity in the payments, particularly in view of the fact that Gibson had been counsel for Tuesday Publications and his testimony was somewhat to the contrary. He stated that while his rent did not increase, "The rent for Royal National went up." Despite Evans' denial that Gibson received any portion of the rent payments, it is clear that Royal National paid Gibson's entire law office rent during the time it shared his office, and the amount was in excess of $400. Thus, while Gibson may not have been literally "pocketing" $400 a month, he was literally benefiting by more than $400 a month during the period that Royal

National shared his law office. In view of this, it seems to me that the majority's reference to the prosecutor's allegation as "totally unsupported by any evidence from which the inference could be derived" (89 Ill. 2d at 340) is simply not true.

The majority also characterizes as unsupported by any evidence and an improper statement of personal belief the prosecutor's comment that it was Gibson, not the corporation, who would have benefited had the sludge project been successful. Although Gibson introduced evidence that showed he had spent considerable time and effort promoting the sludge project, there was also considerable evidence that he was acting on his *own* behalf rather than for the benefit of Royal National. As the appellate court noted, the jury was presented with the factual question as to how much, if any, of Gibson's activities relating to the sludge project were performed on behalf of Royal National.

During Gibson's attorney's closing argument he asked whether Gibson would have been reporting to the shareholders on the progress of the projects if he was really acting on his own behalf or keeping it all for himself. He also reviewed the evidence which showed the time and effort Gibson devoted to the sludge project. In rebuttal the prosecutor made the following comment:

> "Counsel has again brought out that Mr. Gibson worked on these projects before Royal National and he worked on them after Royal National. What this says I believe is that these projects were truly projects of Truman Gibson and had they gone anywhere at all, the shareholders of Royal National might as well have jumped in the Mississippi River because Truman Gibson was going to be on the gravy train and they were going to have to sit around and split

> up shares of a company that had been dissolved in 1974."

There was no objection. To hold, as the majority does, that this statement was without any evidentiary support is patently incorrect. Further, it clearly was not intended as an expression of personal belief but only as a statement of the inferences which the prosecutor believed might be drawn from the evidence. The statement does not even remotely resemble those which this court has held improper. For example, in the only case cited by the majority as authority for its holding, *People* v. *Monroe* (1977), 66 Ill. 2d 317, 323, the prosecutor charged that defense counsel's closing argument was "fraudulent" and that one portion was "the biggest fraud of all." He further stated:

> "That is a preposterous defense. I have never heard of a weaker defense in five years of practicing in criminal law. Do you know why I can't believe it? Because Mr. Olivero [defense counsel] doesn't believe it himself." (66 Ill. 2d 317, 323.)

In *People* v. *Hoffman* (1948), 399 Ill. 57, 65, the State's Attorney stated, "If I had one slightest reasonable doubt about Stanley Hoffman's guilt upon my words as a man and as an American, as a father and grandfather, I would say I do not believe he is guilty and I would dismiss this case. But, I know all the facts in this case as you know various people." Similarly, in *People* v. *Black* (1925), 317 Ill. 603, 619, "Twice the State's attorney told the jury that he would not ask them to send defendants to the penitentiary if he and his associate were not positive of their guilt." Finally, in *People* v. *King* (1916), 276 Ill. 138, 154, the State's Attorney made the following statement in his closing argument:

> "I am not in the habit of prosecuting innocent men. It has not been a rule of my office. If the defendant were not guilty he would not be on trial in this court. I know him to be guilty. I am in possession of facts that convince me of his guilt."

As these cases demonstrate, it is improper for the prosecutor to express his own opinion or belief of a defendant's guilt, in part because by doing so he effectively makes himself a witness without the opportunity of being cross-examined. But it is entirely proper for the prosecutor to comment on a defendant's guilt where the comment is based on the evidence (*People* v. *Black* (1925), 317 Ill. 603, 619; see also *People* v. *Jackson* (1981), 84 Ill. 2d 350, 360), and it is well established that " '[s]tatements of counsel and argument based upon facts and circumstances proved, or upon legitimate inference therefrom, do not exceed the bounds of proper debate and are not to be discountenanced by the courts.' " (*People* v. *Burnett* (1963), 27 Ill. 2d 510, 517, quoting *People* v. *Miller* (1958), 13 Ill. 2d 84, 109; see also *People* v. *Beller* (1979), 74 Ill. 2d 514, 526; *People* v. *Williams* (1968), 40 Ill. 2d 522, 528; *People* v. *Ostrand* (1966), 35 Ill. 2d 520, 531-32.) The quoted comment in this case was not an expression of the prosecutor's own belief; it was a legitimate rebuttal argument based upon the evidence.

With respect to defendants Whitlow and Delfino, the prosecutor made the comment in rebuttal: "[T]hey know that if you pay five hundred bucks to R. Wayne Everett and Company you can get a list of the people who have been taken before * * * and you can tell them a bunch of stories and you know they will fall for it because they have fallen for it before." Again, no objection was made. The majority cites this as improper argument because it implies that defendants had previously engaged in illegal

conduct. The court also apparently concludes that the comment was not based upon any evidence. First, I do not agree that, in the context in which it was made, it implied previous illegal conduct; second, there was evidence in the record that supported this statement.

Patrick Wilson, one of the State's witnesses, testified that Delfino came to his home and invited him to Royal National's East Moline office to discuss the possibility of Wilson working for the firm. He later met with Delfino at his office and discussed sales efforts. He stated that Delfino showed him "lead lists," secured from Wayne Everett of the Everett brokerage firm, and that Delfino told him that the people on the list were people who had been known to invest money.

Carl Kran, an investor, testified that he received a letter from Wayne Everett and Company advising him that a Mr. Delfino of Royal National would be calling him to discuss a possible investment opportunity. The letter was admitted into evidence. On cross-examination by a defense attorney, Kran testified he had previously invested in a land deal with R. Wayne Everett. On redirect examination by the State, Kran stated that he never recouped his investment.

Further evidence introduced by the State included a check from Royal National to Wayne Everett in the amount of $500. Thus, another allegedly improper comment, made without objection, had evidentiary support. Viewed in context, the prosecutor did not imply that defendants had previously engaged in illegal conduct. Rather, the inference was that Everett and Company had a list of people who had previously invested in questionable deals, and that the defendants were able to obtain those names for a $500 fee.

I agree the prosecutor's questions about other corporations and shareholders Gibson was using, and the remark, "[M]aybe this time he will get caught," were improper. Nevertheless, there was no objection, and the error here was not so substantial as to constitute "plain error." (*People* v. *Jackson* (1981), 84 Ill. 2d 350, 360.) Nor was the evidence so "closely balanced" as to justify our review of this error. (*People* v. *Carlson* (1980), 79 Ill. 2d 564, 576.) With the exception of the comment concerning the rental arrangement, none of these allegedly improper remarks were even brought to the trial court's attention until after the jury had been instructed and retired to deliberate.

During the in-chambers *voir dire* of one of the jurors, Mrs. Hicks, the prosecutor made the improper statement: "[I] think it should be clear that it is not the People, Your Honor, asking these questions." Thereafter, while the defense attorneys expressed their displeasure with the prosecutor's comment, none objected to Mrs. Hicks' continued presence on the jury, despite the fact that two alternate jurors had yet to be chosen. No one expressed the view that Mrs. Hicks could no longer be an impartial juror. (*Cf. People* v. *Harris* (1979), 74 Ill. 2d 472, 474-75 (the trial judge did not abuse discretion in failing to discharge a juror on defendant's motion because of the alleged prejudicial effect of the trial court's in-chambers remarks to a juror).) Only after the guilty verdicts were returned and the defense attorneys learned that Mrs. Hicks had been chosen as forewoman did the matter ever come up again. Hence, the issue is waived. See *People* v. *Ford* (1960), 19 Ill. 2d 466, 478-79; *People* v. *Adams* (1954), 4 Ill. 2d 453, 458; see also *Cummings* v. *Chicago Transit Authority* (1980), 86 Ill. App. 3d 914, 919; *Allen* v. *Dorris* (1974), 16 Ill. App. 3d 980, 983-84.

In the prosecutor's opening statement he made two comments which the majority holds objectionable because of the subsequent failure to produce evidence. One such comment was that the investors were told their money would partly be used to build condominiums. As the majority points out, however, one of the State's witnesses testified that he was told of the company's desire to acquire mortgage money for a housing project in the Bahamas. Recently, we held that an opening argument can include a discussion of matters that may reasonably be inferred from the evidence. (*People* v. *Warmack* (1980), 83 Ill. 2d 112, 125-26 (opening arguments need not be limited to a discussion of direct evidence; "[s]ufficient evidence was presented from which the jury could reasonably infer that defendant owned the clothing, and such circumstantial evidence was sufficient to support the assertions of the prosecutor in his opening argument").) I cannot believe that the slight variance between what was said on one point in the opening statement and the actual evidence was of any consequence in this trial. (*Cf. People* v. *Allen* (1959), 17 Ill. 2d 55, 63 (prosecutor's reference in his opening statement to an admission by defendant was not reversible error despite the lack of such evidence).) Moreover, this particular point was not raised in any of the defendants' post-trial motions and has been waived. 73 Ill. 2d R. 366(b)(2)(iii); *People* v. *Adkisson* (1980), 83 Ill. 2d 1, 7; *People* v. *Tannenbaum* (1980), 82 Ill. 2d 177, 181; *People* v. *Foster* (1979), 76 Ill. 2d 365, 380.

The prosecutor also informed the jury in his opening statement that the investors were not told that the one legitimate bill incurred by Royal National was not paid. As the majority notes, this allegation was improper because the bill was incurred after the last shares of stock were sold. Nevertheless, the prosecutor cited numerous

misrepresentations and omissions by defendants that would have influenced an investor's decision on whether to purchase stock, and considerable evidence was produced in support thereof. Further, the jury heard the actual evidence which disclosed when this bill was incurred. Thus, the reference in the opening statement to the unpaid bill the investors were not told about was not reversible error. See *People* v. *Allen* (1959), 17 Ill. 2d 55, 63.

Nor do I believe that Perry Streeter's testimony justifies a reversal. Considering all of the evidence in this lengthy record, and the number of witnesses who testified concerning the defendants' misrepresentations, the Streeter testimony could not, in my opinion, have been a material factor in the conviction of these defendants. (*People* v. *Dukett* (1974), 56 Ill. 2d 432, 444, *cert. denied* (1974), 419 U.S. 965, 42 L. Ed. 2d 180, 95 S. Ct. 226.) Some 23 witnesses testified on behalf of the State. Their testimony, together with the voluminous documentary and other evidence, overwhelmingly established defendants' guilt. Contrary to the representations made to the investors that each defendant had contributed $50,000 in corporate capital, the largest such contribution was $220. Despite their assertions that no salaries were being paid them, more than 60% of the money invested by the victims was disbursed to defendants in the form of salaries and expenses. Numerous other misrepresentations and failures to disclose were testified to as occurring prior to and during Royal National's brief existence. In sum, I simply cannot believe that this verdict could have been otherwise had any of the other alleged errors not occurred. *People* v. *Jackson* (1981), 84 Ill. 2d 350, 360.

I would affirm the convictions of all defendants.

JUSTICE SIMON joins in this dissent.

APPENDIX 2

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

FOREST P. WHITLOW *et al.*,

Defendants-Appellants.

Third District No. 78-33
Affirmed in part and reversed in part.
Opinion filed July 8, 1980.

Mr. JUSTICE SCOTT delivered the opinion of the court:

After a lengthy trial in Rock Island County the defendants Whitlow, Brewer, Delfino, Gibson and Marando were all found to be guilty of the offenses charged in a 12-count indictment. Briefly summarized, the 12 counts charged that all the defendants sold stock in a corporation known as Royal National Investment and Mortgage Corporation and that in selling the stock they made false statements and omitted to inform prospective purchasers of material matters relating to the stock and the company. Counts I through V charged the defendants with conspiracy and substantive violations of the Illinois Securities Law of 1953 and specifically sections 12(F), (G), (I) and 14 (Ill. Rev. Stat. 1973, ch. 121½, pars. 137.12(F),(G),(I) and 137.14). Count I charged the defendants with conspiracy to violate the Illinois Securities Law of 1953. Count VI charged the defendants with conspiracy to commit the offense of theft in violation of section 8—2(a) of the Criminal Code of 1961 (Ill. Rev. Stat. 1973, ch. 38, par. 8—2(a)). Counts VII through XII charged the defendants with theft by deception in violation of section

16—1(b) of the Criminal Code of 1961 (Ill. Rev. Stat. 1973, ch. 38, par. 16—1b).

All of the defendants with the exception of Marando were officers and directors of Royal National. Marando was a salesman of the corporation who was paid a commission on the stock sales he made.

After approximately three weeks of trial the trial of the defendant Marando was severed from that of the other when it became apparent that his defense was antagnoistic to that of the other defendants. He later pleaded guilty to counts II through V (securities law violation) of the indictment and was sentenced to concurrent terms of not less than one nor more than three years of imprisonment.

Subsequent to the jury return of guilty verdicts against the defendants Whitlow, Brewer, Delfino and Gibson on all 12 counts of the indictment, the trial judge vacated and dismissed judgments on counts I, VI and XII. The order dismissing counts I and VI (the conspiracy counts) was entered pursuant to section 8—5 of the Criminal Code of 1961 (Ill. Rev. Stat. 1973, ch. 38, par. 8—5), which mandates that judgment shall not be entered on substantive counts as well as a conspiracy count. Count XII was dismissed on the grounds that it did not properly allege an offense.

The trial court permitted the judgments of guilty on the remaining nine counts to stand. The defendant Gibson was sentenced to concurrent terms of imprisonment of not less than one nor more than three years on each count and was further fined in the amount of $20,000. The defendants Whitlow, Brewer and Delfino were sentenced to concurrent terms of imprisonment of not less than one nor more than three years on each count.

A brief summary of the facts which resulted in the defendants' convictions is as follows: The evidence ad-

duced at the trial of the defendants disclosed that after the incorporation of Royal National they personally and/or with the assistance of their salesman, the defendant Marando, proceeded to sell stock. The stock was sold for $1 per share and in most instances a minimum purchase of 10,000 shares was required. In opening statement the State informed the jurors that when selling the stock it was represented to a number of prospective purchasers that the corporation would engage in the acquisition of "sludge" which would be transported to the Bahamas or other Caribbean islands for use as fertilizer on nonproductive soil. The term "sludge" is used in referring to processed wastes, primarily human wastes, the disposal of which is presenting a problem to large municipalities. Other possible ventures mentioned were the building of condominimums in the Bahamas, a program to train Bahamanian people for various types of employment and the ownership of a scholarship research program. The record further establishes that the defendant Gibson was interested in and did do a considerable amount of investigation, research and other activities in regard to the "sludge" program. A great portion of his time for a 1½-year period was devoted to promoting a sludge project. He worked with officials from the Metropolitan Sanitary District of Chicago which is engaged in a sludge project. He also had numerous contacts with officials from the Bahamian Government and the United States. The sludge project never materialized, and the jury was confronted with a factual question as to how much if any of defendant Gibson's activities relating to sludge were performed on behalf of Royal National. Ultimately, approximately $220,000 was realized from the sale of Royal National's stock, a great portion of which was disbursed to the defendants Whitlow, Brewer, Delfino and Gibson as payment of salaries and for the reimbursement for alleged expenses. The de-

fendant Marando received a comparatively smaller amount for commissions earned. None of the investors ever realized any financial gain, but on the contrary all suffered losses.

The defendant Gibson prior to and at the time of the incorporation of Royal National was a lawyer. From August 1971 to July 1974, he maintained an office on North Michigan Avenue in the city of Chicago. From May 1973 to January 1974, defendant's office space was also used by Royal National, which entered into a rental agreement with a company known as Tuesday's Publications, the owner of the office building or the entity in charge of renting the same. While Royal National used the office facilities they were also used by defendant Gibson in handling business other than that of Royal National.

This appeal presents a multiplicity of issues, so a further recitation of additional facts will be set forth if and when they become pertinent.

Attention is first directed to the defendants Whitlow, Brewer, Delfino and Gibson's contention that they should receive a new trial because of prejudicial misconduct throughout the trial on the part of the prosecutor.

A number of incidents occurred during the trial which are claimed by the defendants to have resulted in misconduct on the part of the prosecutor of such a serious nature as to require a reversal of their convictions and a remandment for the purpose of a new trial. Those incidents complained of occurred in the prosecutor's opening statement, *voir dire* examination and closing argument. This court will consider them sequentially.

The defendants contend that in the opening statement the prosecutor claimed that the evidence to be adduced

would prove that the investors were told of certain matters which would influence a reasonable investor in arriving at his decision as to whether or not he should purchase stock. Specifically, the defendants cite the following comment made by the prosecutor:

> "They [the investors] were never told that the one legitimate bill ever incurred by Royal National, a bill to send something [*sic*] to the Bahamas to see if some of these projects might be feasible, a bill for $2500.00, a bill amounting to not even one percent of the total income of Royal National never was paid and goes unpaid to this date."

Evidence disclosed that a bill was owed by Royal National to Dr. W. J. Bauer, a consulting engineer. Dr. Bauer's business was contacted and retained by James Braxton, an official of the Metropolitan Sanitary District, to conduct a study in certain areas of the Bahamas as to the feasibility of a sludge operation in the areas designated. Baxton and defendant Gibson had frequently met and worked together in regard to a sludge project. It is evident that Braxton, who employed Bauer's business, was acting for Gibson. Bauer was to testify that he assigned Dr. Tom Hinsley of the University of Illinois to journey to the Bahamas and make the requested study. Hinsley did so in the summer of 1974. It was Bauer's further testimony that the bill was for $1,200 rather than $2,500, but in any event it remained unpaid as of the dates of the trial.

The defendants correctly argue that it would have been impossible to advise the prospective purchasers of the unpaid bill since it was not incurred until long after the sales of stock.

This court has stated:

> "Assumptions and statements of fact which are not based upon evidence admitted at trial, may not proper-

ly be argued to the jury. (*People* v. *Beier*, 29 Ill. 2d 511, 194 N.E.2d 280.) Upon similar reasoning the prosecutor cannot comment during his opening statement upon what testimony will be introduced at trial and then fail to produce such testimony. Such arguments and comments effectively assert the prosecutor's own unsworn testimony in lieu of competent evidence." *People* v. *Rogers* (1976), 42 Ill. App. 3d 499, 502, 356 N.E.2d 413, 416.

It is the State's contention that the complained of comment was merely made in an incorrect context. It is difficult if not impossible to perceive a context where such a comment would be justified and permissible because it is not susceptible of proof. The State's other response to the defendants' claim of error is that prejudice was eliminated as the result of the trial court advising the jury that opening statements as well as closing arguments were not evidence in this case. The record supports the State's assertion that the jury was so cautioned.

The prosecutor in his opening statement to the jury informed them that the defendants had lied to prospective investors by telling them that Royal National would use some of the money received from stock sales to invest in a venture, the purpose of which was to build condominiums in the Bahamas. Twenty-three witnesses testified for the State. Seventeen of the witnesses were individuals who had purchased stock from the corporation. The record is devoid of any testimony from these witnesses that their money would be used to construct condominiums. Witness Westercamp testified that some representations had been made to him that Royal National might engage in locating or finding money for mortgage purposes and referred to housing in the Bahamas as a project that might have a need for mortgage money. There was no testimony regarding the ownership, management or construction of

condominiums by Royal National. Again the prosecutor produced a situation where an allegation was made in his opening statement which was not later supported by the evidence. If the jury relied upon the prosecutor's promise of proof as to allegations concerning a condominium venture by Royal National, the defendants were as a result prejudiced. *People* v. *White* (1978), 56 Ill. App. 3d 757, 372 N.E.2d 691.

During the *voir dire*, and after four jurors had been accepted an dsworn, counsel for the defendant Marando informed the court that one of the four jurors had misrepresented certain facts during *voir dire*. In order to prevent or minimize any prejudice which could possibly result from a further interrogation of this juror, the court concluded to question the juror, Mrs. Hicks, in chambers with all counsel present. The prosecutor interrupted the in-chambers interrogation by the court of Mrs. Hicks by making the following statement, "I think that it should be clear that it is not the people, Your Honor, asking these questions." Mrs. Hicks was later selected to serve as foreman of the jury.

The statement of the prosecutor was not in context with any other statements made by anyone or answers submitted by Mrs. Hicks. At the time the prosecutor interjected his statement no questions had been submitted by any party except the court. The only interpretation that can be gleaned from the statement is that the prosecutor wished to convey to Mrs. Hicks that if she was in any way discommoded, or if she felt her integrity was being questioned, it was not because of any action on the part of the State. The statement of the prosecutor smacks of a calculated effort on the part of the prosecution to prejudice the defendants. Such comment was totally unwar-

ranted, for it is incumbent on both the prosecutor and the defense to strive to obtain a jury free from any taint of bias or prejudice. The comment to a degree served to defeat the very purpose of the trial court's decision to hold an in-chambers interrogation, that purpose being to foreclose any possible prejudice that might result from an examination of Mrs. Hicks in open court.

In the presentation of its case the State called Mrs. Bernice Streeter. Mrs. Streeter testified as to being contacted by the defendant Marando, who desired to sell stock in Royal National. She further testified as to representations concerning the corporation's interest in a sludge operation and scholarship program. She further testified that her husband was present and that they purchased stock and received a receipt which she identified. At the conclusion of Mrs. Streeter's testimony her husband, Percy Streeter, was called as a witness. The sole testimony elicited by the prosecutor from Mr. Streeter was as follows:

> "Mr. Streeter: Yeah, I told him [defendant Marando] I didn't have the money to invest and I was strapped and then I started the story a few years before that I lost my daughter and I had an insurance policy on her since she was a little girl and she left two little girls and I had that $10,000 life insurance policy so I asked him if it was a good place to invest it for these two little girls and he said it was and so that is where the $10,000 went."

Counsel for the defendant Gibson moved for a mistrial or that the testimony be stricken and counsel for other defendants joined in these motions. The trial court denied both motions. In examining the record it is clear that Mr. Streeter did not testify as to any of the misrepresentations charged in the indictment and in fact to have done

so would have been repetitious since his wife Bernice had testified in depth as to such matters. It should be further noted that defense counsel, even though requested, had received no prior statement as to what Mr. Streeter's testimony would be and that further the witness had refused to talk to defense counsel.

It is the contention of the defendants Whitlow, Brewer, Delfino and Gibson that the witness was called to the stand for the sole purpose of relating a story which was calculated to instill sympathy in the minds of the jurors to the prejudice of the defendants. Defense counsel categorized the calling of the witness and his testimony as a "planned operation" which, because of lack of knowledge, precluded the defendants as well as the trial court from doing anything to prevent the introduction of what was referred to as "devastating and prejudicial" testimony. The prosecutor acknowledged that he knew what the testimony of Mr. Streeter would be and that was the precise reason he put him on the stand. The prosecutor further agreed that the testimony was prejudicial and devastating to the defendants but explained that devastating testimony was what the defendants' behavior merited. The trial court admonished the prosecutor to try to refrain from what verges on somewhat inflammatory testimony and then denied the defendants' motion for mistrial.

There is no difficulty in determining that the evidence produced by the testimony of Mr. Streeter was the result of contrivance on the part of the State, since the prosecutor admitted that the testimony was prejudicial, inflammatory and that he knew what the witness would say. In weighing the tendency of offered evidence to prove an issue in dispute against its tendency to produce passion and prejudice out of proportion to its probative value,

the matter is largely within the sound discretion of the trial court. Evidence, however, which will only serve to prejudice the minds of the jury is properly excluded. See 29 Am. Jur. 2d *Evidence* §260, at 310 (1967).

With these guidelines in mind it must be determined if the probative value of the testimony outweighed its prejudicial effect. The State argues that the testimony was relevant to illustrate the unethical conduct of the defendant Marando (whose case at the time had not yet been severed from that of the other defendants) and that it further was relevant to the state of mind of the defendants. The State in presenting this argument overlooks the fact that dispassionate proof of misrepresentation both by commission and omission as well as participation in an artifice or scheme to defraud, would equally as well if not better illustrate unethical conduct or the state of mind of the defendants. A planned contrivance to prejudice, inflame or create sympathy in the minds of jurors should not be glossed over by a court of review. Mr. Justice Schaefer of our supreme court was confronted with a similar situation in the case of *People* v. *Newbury* (1972), 53 Ill. 2d 228, 290 N.E.2d 592. The justice in *Newbury*, while affirming the conviction of a defendant for murder, nevertheless made the observation that questions deliberately designed to prejudice the defendant and the same being irrelevant could warrant a reversal.

The complained-of incident concerning Mr. Streeter's testimony occurred early in the trial of the defendants. The trial court in denying defendants' motions admonished the prosecutor as to "somewhat inflammatory testimony" but indicated that the jury would be hearing a lot of testimony. It is apparent that the trial court did not con-

sider this incident occurring early in a trial which was to continue for approximately three weeks necessitated the granting of a mistrial. The trial court should not be faulted for this ruling. The incident upon review, however, should be considered in conjunction with other alleged instances of prosecutorial misconduct.

The defendants further complain of certain statements made by the prosecutor in his closing argument. The first complained-of statement centers around the renting by Royal National of office space in the city of Chicago. The space rented was that which had been rented by the defendant Gibson in 1971 for his law office. Royal National commenced using the space in May 1973 in conjunction with Gibson, who was secretary of the corporation. Commencing in May 1973, Royal National paid all the rent which was in the sum of $625 per month. In his closing argument the prosecutor stated:

> "What about these offices? Necessary? Unnecessary? Extravagant? Unextravagant? I won't for a minute stand here and tell you that a company doesn't need offices but I will tell you that when rent jumps $400 a month for the same space at 625 North Michigan Avenue in Chicago, something is wrong and you can look at the ledger sheets yourself and find out how much Truman Gibson was getting during the time he was associated with this company to pay his rent, where was that extra $400 a month going? *I submit to you it was going into Mr. Gibson's pocket.*" (Emphasis added.)

The State does not contend that this statement of the prosecutor was supported by the evidence, but instead argues that great latitude is granted to a prosecutor in the presentation of his final argument. It should be observed, however, that such latitude does not encompass a

totally unsupported charge that a defendant committed a theft. The charge that the defendant Gibson was "pocketing money" was not made in the form of an innuendo but was a flat, forthright assertion.

An affidavit of the president and chairman of the board of the company in charge of the rental of the premises wholly refutes the prosecutor's statement that the defendant Gibson received any portion of the rental payments made by Royal National and that the rental charge for the office space did not materially increase when used by Royal National. The error committed by the prosecutor in this instance is compounded in that the record clearly supports the fact that the State had pretrial knowledge as to the absence of any wrongdoing on the part of Gibson as to the rental arrangement. An accusation unsupported by evidence that a defendant unlawfully pocketed money classifies him as a thief and consequently is inflammatory and prejudicial. The prosecutor violated the rule that has been consistently adhered to by this court that assumptions and statements of fact not based upon the evidence in a case may not be argued to the jury. *People* v. *Johnson* (1976), 35 Ill. App. 3d 666, 341 N.E.2d 443; *People* v. *Young* (1975), 33 Ill. App. 3d 443, 337 N.E.2d 40.

This court in adhering to the principle that every defendant is entitled to a fair trial has not been loath to reverse criminal convictions because of improper comments by a prosecutor which served to deny a fair trial. See *People* v. *Thomas* (1976), 37 Ill. App. 3d 320, 346 N.E. 2d 190; *People* v. *Monroe* (1975), 32 Ill. App. 3d 482, 335 N.E.2d 783, *aff'd* (1977), 66 Ill. 2d 317, 362 N.E.2d 295.

In examining the closing argument of the prosecutor it is apparent that other allegations and accusations as to

misconduct on the part of the defendant Gibson were freely and loosely made. In referring to Gibson's activities the jury was asked:

> "How many people has he [Gibson] got paying him to make a project eventually pay off for him? How many other corporations was he using? How many other shareholders? How much money was he taking * * *."

The prosecutor in referring to Gibson stated: "Maybe this time he will get caught." The prosecutor as to defendants Brewer, Whitlow and Delfino argued that "[they] know that if you pay $500 to R. Everett & Company you can get a lot of people who have been taken before * * *." It was further stated in final argument that "Truman Gibson received $8,000 a month for five months." In referring to Gibson's efforts in regard to the sludge project the prosecutor voiced his opinion by stating:

> "What this says I believe is that these projects were truly projects of Truman Gibson and had they gone anywhere at all, the shareholders of Royal National might as well have jumped in the Mississippi River because Truman Gibson was going to be on the gravy train and they were going to have to sit around and split up shares of a company that had been dissolved in 1974."

It is not necessary to engage in an analyzation of the evidence as to the remarks which we have set forth and attributed to the prosecutor. It is sufficient to note that they were not supported by the evidence. The State does not quarrel strongly with this finding but attempts to justify them as being legitimate inferences which could be arrived at in considering the evidence. This court quarrels not with the rule that a jury can draw logical inferences from the evidence but in the instant case the prose-

cutor's remarks exceeded the bounds of inferences and instead were blatant accusations that served to inflame and prejudice the jury.

A zealous prosecution is to be commended; however, an overzealous prosecution too frequently results in the striking of foul blows. (*Berger* v. *United States* (1935), 295 U.S. 78, 79 L. Ed. 1314, 55 S. Ct. 629.) Reviewing courts have been accused of seeking a perfect trial in lieu of seeking the truth. This court recognizes that it is doubtful if any trial of any consequence can ever be classified as a perfect one; however, this court is dedicated in its endeavors to provide an accused a fair trial.

In examining the prosecutorial misconduct which occurred in the opening statement, *voir dire* examination and final argument it could well be concluded that one or two of the impermissible acts might require a reversal and remand for a new trial. Any doubt as to the necessity for such a result is eliminated when the acts are considered in their totality. The cumulative effect of such persistent prosecutorial misconduct as to Whitlow, Brewer, Delfino and Gibson made a fair trial impossible and therefore as to these defendants their convictions are reversed and a new trial is ordered. See *Clarquist* v. *Kirschenman* (1977), 55 Ill. App. 3d 76, 370 N.E.2d 840; *Champion* v. *Knasiak* (1974), 25 Ill. App. 3d 192, 323 N.E.2d 62; *Andes* v. *Lauer* (1980), 80 Ill. App. 3d 411, 399 N.E.2d 990.

In arriving at the determination that all the convictions of all the defendants except that of Marando should be reversed, this court notes that the greater portion of the prosecutorial misconduct was directed solely at the defendant Gibson. That such was the case is of no consequence since the State prosecuted all defendants for *inter alia* offenses of conspiracy and further submitted

and had given to the jury an "accountability" instruction. Throughout the trial and in its brief the State's position has at all times been that the misconduct of one defendant was attributable and should be imputed to the other defendants. In the light of such offenses being charged by the State and its theory of prosecution, the misconduct of the prosecutor, though for the most part directed at only one defendant, served to prejudice all defendants.

Having determined that a new trial is in order, it is necessary that we determine several other issues presented in this appeal.

It is asserted by the defendants Whitlow, Brewer, Delfino and Gibson that the indictment returned against them should have been dismissed since the only witness appearing before the grand jury was unsworn and as a consequence incompetent to testify.

It is the State's contention that the transcript of the grand jury proceedings was not involved in that the witness was in fact sworn and prior to trial the court was informed that the state's attorney, assistant state's attorney, an assistant Attorney General, and one investigator from the Attorney General's office would so testify. The trial judge accepted the assertion and denied the motion to dismiss the indictment.

The trial court's ruling was correct; however, this court is of the opinion that its ruling should have been predicated upon the grounds that an indictment will not be dismissed on a mere technical error. (*People* v. *Petropoulos* (1965), 59 Ill. App. 2d 298, 208 N.E.2d 323.) It is not the intention of this court to abrogate the requirement that witnesses should be sworn or that they should make an affirmation to tell the truth, but in the instant case the

grand jury transcript was silent as to this matter and hence it is reiterated that a dismissal of the indictment would be predicated upon a "nicety" or technical error, and such practice would not be conducive to the administration of justice.

The defendants further argue that evidence submitted to the grand jury either failed or was insufficient to support the return of an indictment against them. An enlightening case upon this question is *People* v. *Melson* (1977), 49 Ill. App. 3d 50, 363 N.E.2d 888. As stated in *Melson* this appellate court district adheres to the rule that sufficiency of evidence presented to a grand jury is not listed among the grounds for dismissal set forth in section 114—1(a)(1-10) of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1977, ch. 38, par. 114—1(a)(1-10)). In view of this rule the defendants' motion to dismiss the indictment was properly denied. See also *People* v. *Thomas* (1975), 24 Ill. App. 3d 907, 322 N.E.2d 97.

The defendants Whitlow, Brewer, Delfino and Gibson further contend that the trial court erred in denying a motion to dismiss the indictment and in support of this contention present several arguments.

They first assert that counts II through V should have been dismissed in that they fail to allege the element of specific intent. The counts charge the defendants with criminal violation of the Illinois Securities Law of 1953 (Ill. Rev. Stat. 1973, ch. 121½, par. 137.12(F), (G), (I)). This precise question has been determined contrary to the views of the defendants in the case of *Home Indemnity Co.* v. *Reynolds & Co.* (1962), 38 Ill. App. 2d 358, 187 N.E. 2d 274. In this case the reviewing court stated:

> "Soliciting the sale of an unregistered security is proscribed by the statute. The prohibition against

solicited sales is unqualified. No motive, no knowledge that the security is unregistered, no intent to defraud the purchaser, no particular mental state and no specific intent to violate the law is required. The statute was designed to prevent injury to the investing public and it indicates a legislative purpose to impose absolute liability for its violation." 38 Ill. App. 2d 358, 373, 187 N.E.2d 274, 281.

It should be noted that the statutory provisions which the defendants were charged with violating do not mention specific intent to defraud or knowledge as an element of the offenses. There is precedential authority that where such is the case it is not necessary that the indictment allege the element of specific intent, but it is sufficient if it is proved and that the jury be charged that finding it is essential and a requisite to conviction. *Tallman* v. *United States* (7th Cir. 1972), 465 F.2d 282; *People* v. *Vraniak* (1955), 5 Ill. 2d 384, 125 N.E.2d 513.

The defendants further attack counts II through V because they fail to allege who purchased the securities. It is not an all-encompassing rule that every indictment must allege the identity of the victim. *People* v. *Crouch* (1963), 29 Ill. 2d 485, 194 N.E.2d 248 (forgery prosecution); *People* v. *Peck* (1963), 29 Ill. 2d 480, 194 N.E.2d 245 (burglary prosecution).

Assuming, however, that the naming of victims in an indictment is essential, then they are properly identified in counts VII through XII in the instant case. The specificity of a charge against an accused must be determined by the reading of the whole document. *People* v. *Garmon* (1974), 19 Ill. App. 3d 192, 311 N.E.2d 299; *People* v. *Williams* (1967), 37 Ill. 2d 521, 229 N.E.2d 495.

The defendants also claim that counts II through V fail to state an offense because they are duplicitous.

This attack is aimed at counts II and III, which allege that the defendants made misrepresentations and failed to state material facts between specified dates covering a period of several months. It is the defendants' position that the numerous misrepresentations and omissions alleged to have occurred during this time span (May, June and July of 1973) should have been listed separately. We disagree, since the counts alleged a general course or practice of misconduct over a particular period of time, all of which resulted in defrauding investors. Had each misrepresentation or omission been the subject matter of a separate count, the defendants might now be arguing the converse, to wit, the indictment was complicated to a fault and too repetitious. The counts adequately informed the defendants of the charges against them, and they were protected from double jeopardy resulting from subsequent prosecutions for alleged misconduct within such time span. *Virgin Islands* v. *Smith* (3d Cir. 1971), 445 F.2d 1089.

It is also argued that several counts of the indictment are constitutionally vague. It is apparent that they quarrel with counts which in one instance allege a number of specific misrepresentations "among others" and in two other counts which charge omissions of material facts, but the allegations of specific omissions are preceded by the words "included but not limited to the following."

At first blush the complained-of phrases seem to be "catch all" provisions which are vague and which would place the defendants in an uncertain position when attempting to prepare a defense. In examining the counts in full, however, we reach a different conclusion. The alleged misrepresentations and omissions are all of a generic nature, *i.e.*, statements as to how the investors' funds would be invested and failure to state that the defendants

had invested money in the corporation and yet were benefiting from the proceeds derived from the sale of stock. These counts also confine the allegations to the time span of May, June, July of 1973. The counts, when read in their full context, adequately inform the defendants of the nature of the charges against them and afford far greater protection from double jeopardy than they would have had the complained-of phrases not been present.

The defendants fault counts IV and V because of the following wording. In count IV the defendants are charged conjunctively with engaging in "transactions, practices *and* courses of business * * * which worked *and* tended to work a fraud and deceit upon the purchasers." (Emphasis added.) Count V charged the defendants conjunctively with employing a "device, scheme *and* artifice to defraud. (Emphasis added.) It is the contention of the defendants that the statutory provisions provide "[a]ny transaction, practice *or* course of business in connection with the sale or purchase of securities which works *or* tends to work a fraud or deceit upon the purchasers * * *." (Emphasis added.) Ill. Rev. Stat. 1973, ch. 121½, par. 137.12(F).

Section 12(I) (Ill. Rev. Stat. 1973, ch. 121½, par 137.12 (I)) prohibits individuals from employing "any device, scheme *or* artifice * * *." (Emphasis added.)

It is argued that an indictment framed in the conjunctive is invalid which is based upon a statute worded in the disjunctive. In support of this contention the defendants cite the case of *People* v. *Woolfolk* (1973), 11 Ill. App. 3d 911, 298 N.E.2d 14. In *Woolfolk* a defendant's conviction for possession of policy slips was reversed because one count of an indictment was duplicitous in that it listed a number of separate offenses in the conjunctive

and in only one count. The opinion in *Woolfolk* stresses that the fatal error was to list a number of offenses in one count. We quarrel not with the holding in *Woolfolk*. In the instant case, however, a different situation is presented in that the statutes in question maintain several acts disjunctively and prescribe that each shall constitute the same offense and is subject to the same punishment. In the light of such a statute all or any of the acts may be charged conjunctively as constituting a single offense. *People* v. *Diekelmann* (1937), 367 Ill. 372, 11 N.E.2d 420; *People* v. *Shaver* (1937), 367 Ill. 339, 11 N.E.2d 400; *People* v. *Pierce* (1975), 26 Ill. App. 3d 550, 325 N.E.2d 758.

The defendants also directed their attention to counts VII through XI and claim that they fail to state an offense since they do not allege the means or instrument of the offense they seek to charge, to wit, theft by deception. These counts charged the offense in the language of the statute (Ill. Rev. Stat. 1973, ch. 38, par. 16—1(b)). *People* v. *Kamsler* (1966), 67 Ill. App. 2d 33, 214 N.E.2d 562, upholds the validity of an indictment framed in the language of the statute in question. *Kamsler* speaks for itself, and no beneficial purpose would be served by setting forth herein the reasoning of this applicable case.

It is also contended that counts VII through XI are invalid in that they do not set forth the amount of money involved. We find no merit in this contention since it has been rejected by the reviewing court in *People* v. *Brouilette* (1968), 92 Ill. App. 2d 168, 236 N.E.2d 12. It is sufficient to allege as was done in the instant case that property of value was taken.

For the reasons stated the trial court correctly denied the motions of the defendants to dismiss the indict-

ment on the various grounds raised and presented for review in this appeal.

The defendants further claim that venue was not adequately proved in counts VIII and X of the indictment. The evidence discloses that the alleged victims paid for the purchase of stock in Royal National in Henry County, not Rock Island County. It is undisputed that venue must be proved before a conviction will be upheld. Both the defendants and the State in support of their respective positions cite what they assert to be precedential case law. We merely note that none of the cited cases address the venue question where the offense charged is theft by deception.

We believe that the question of venue for such an offense as well as the offense of theft is clearly determined by statute.

Our Criminal Code provides:

> "16—1 Theft) A person commits theft when he knowingly:
>
> (a) * * *
>
> (b) Obtains by deception control over property of the owner; * * *" Ill. Rev. Stat. 1973, ch. 38, par. 16—1(b).

In regard to venue our Criminal Code provides:

> "1—6. Place of Trial) (a) Generally.
>
> Criminal actions shall be tried in the county where the offense was committed, except as otherwise provided by law. * * *
>
> * * *
>
> (g) Theft.
>
> A person who commits theft of property may be tried in any county in which he exerted control over such property." Ill.Rev.Stat. 1973, ch. 38, par. 1—6(g).

The offenses of theft and theft by deception are exceptions to the general rule that the place of trial is where the offenses were committed, the exceptions being that as to theft or theft by deception venue can be had in a county other than that where the "taking" took place. It can be had in a county where control over the taken property was exerted. While our supreme court set forth no reasoning, this is the result reached in *People* v. *Brown* (1942), 379 Ill. 262, 40 N.E.2d 66. In *Brown* a conviction in Cook County was upheld where the defendant stole a coat in Lake County.

In the instant case the defendants received checks in Henry County for the purchase of stock; however, they transported these checks to Rock Island County where they were deposited in a bank. The evidence clearly establishes that the defendants had the checks in their control both in Henry and Rock Island Counties and therefore venue was properly had in the latter county.

A number of other issues are presented in this appeal; however, a determination of them is not necessary in view of this court's conclusion that the defendants Whitlow, Brewer, Delfino and Gibson are entitled to a new trial.

As previously set forth, the defendant Marando entered pleas of guilty to counts II through V of the indictment, these counts charging violation of the Illinois Securities Law of 1953. The trial court entered judgment of guilty on these counts and sentenced Marando to concurrent sentences of one to three years on each count. Marando raises a number of issues in this appeal, two of which have already been determined, namely, whether the grand jury process was abused and whether the indictment properly stated offenses. These issues have heretofore been determined and adversely to the defendants Whitlow, Brewer,

Delfino and Gibson. The same determination applies to the identical issue posed by Marando.

Marando contends that his guilty pleas and sentences imposed thereon should be vacated since the trial court did not comply with Supreme Court Rule 402 (Ill. Rev. Stat. 1977, ch. 110A, par. 402).

Marando specifically argues that reversible error was committed when he was not advised that consecutive sentences could be imposed, that he was advised that there was a mandatory parole term of three years rather than two years which could be imposed, and that the court was never informed that a plea agreement had been entered into.

It should first be noted that these arguments are raised by Marando for the first time in this appeal. They were not raised in his motion to withdraw his pleas of guilty filed pursuant to Supreme Court Rule 604(d) which states, "Upon appeal any issue not raised by the defendant in the motion to withdraw the plea of guilty and vacate the judgment shall be deemed waived." (Ill. Rev. Stat. 1977, ch. 110A, par. 604(d).) Marando has in fact waived the alleged errors, but even if such were not the case there is little if any substance to them.

The court's failure to admonish the defendant of the possibility of consecutive sentences when the same were not imposed does not constitute reversible error. (*People* v. *Waud* (1976), 43 Ill. App. 3d 85, 356 N.E.2d 628; *People* v. *Mass* (1975), 31 Ill. App. 3d 759, 334 N.E.2d 452; *People* v. *Cherry* (1975), 29 Ill.App.3d 929, 332 N.E.2d 55.) Marando was admonished as to a mandatory parole term; however, he was advised that term would be for three years rather than two years. A technical error was committed, but the error was to the benefit of the defendant. Marando does

not suggest that he would not have entered pleas of guilty had he known that the parole term would have been lesser than that which he was told to expect. Marando complains about erroneous admonishment that benefited rather than prejudiced him.

That the plea agreement was not revealed to the court does not constitute reversible error when Marando was sentenced in accordance with the agreement. Marando makes no claim that his sentences were in any way different from those agreed upon, so if there was any error it was harmless. *People* v. *Dudley* (1974), 58 Ill. 2d 57, 316 N.E.2d 773; *People* v. *Talbot* (1973), 9 Ill. App. 3d 688, 292 N.E.2d 561.

The defendant Marando also assigns as error the failure of his attorney to comply with that portion of Supreme Court Rule 604(d) which requires that a certificate be filed with the trial court in which it is stated that counsel has conferred with his client in order to ascertain the client's contention of error regarding his entry of a guilty plea. (Ill. Rev. Stat. 1977, ch. 110A, par. 604(d).) The filing of such a certificate is required of appointed counsel, and in the instant case Marando was represented by private counsel. Even if this requirement related to private counsel, the failure to file th ecertificate is harmless error where counsel had in fact conferred with his client as required by Supreme Court Rule 604(d). Marando does not contend that his counsel failed to confer with him and in other respects comply with the rule, so the claim of error by Marando is without merit. *People* v. *Thompson* (1978), 57 Ill. App. 3d 100, 372 N.E.2d 1105.

Marando vigorously argues that he was not afforded effective assistance of counsel. The defendant Marando being represented by private counsel, the test is whether the representation afforded is of such low caliber as to

amount to no representation at all or reduces the court proceedings to a farce or a sham (*People* v. *Murphy* (1978), 72 Ill.2d 421, 381 N.E.2d 677; *People* v. *Torres* (1973), 54 Ill. 2d 384, 297 N.E.2d 142.) The record in this case belies the fact that counsel for Marando afforded him representation that reduced his trial and court proceedings to a farce or a sham. On the contrary, prior to his trial being severed from that of the co-defendants, the record gives the impression that Marando was astutely represented. His counsel cross-examined the lengthy array of State witnesses and produced witnesses in behalf of Marando whose testimony provided Marando with a defense. After his case was severed from that of the other defendants, Marando voluntarily accepted the terms of a plea agreement arranged by his counsel. He now claims that he never understood the nature of the case. Such an assertion is difficult to accept in light of his presence for approximately three weeks during the course of a trial in which he was a defendant. He cites the alleged errors pertaining to Supreme Court Rules 402 and 604 as examples of his counsel's incompetence; however, we have determined these errors to be of technical nature having no prejudicial effect. Marando for a long period of time was represented by counsel of his own choice, and he now complains that after pleading guilty and being sentenced his counsel failed to produce two witnesses at hearings on his motion for continuance on the hearing to vacate the guilty plea he entered. He classifies these witnesses as being essential, yet he fails to inform this court as to what essential testimony he hoped to adduce from the witnesses. Errors in jurlgment or strategy do not establish incompetency. (*People* v. *Murphy; People* v. *Torres.*) The conduct of Marando's counsel falls far short of reducing the court proceedings to a farce or sham.

Lastly, Marando contends that he was the least culpable of all the defendants and that the court should reduce his sentence or order a remand to the trial court for the purpose of resentencing. In support of his "least culpable" argument Marando states that he is approximately 20 years younger than the other defendants, that he was not an incorporator of Royal National, he did not have access to the books and records of the corporation, that from his activities he realized only commissions from the sale of the stock, he acted under the direction of the other defendants, and he was the only one to plead guilty.

Marando in age is considerably younger than the other defendants, yet he has attained his legal majority, being 24 years old. As he claims, he was the only defendant to plead guilty, and he considers this act merits a sentence of a lesser degree than that imposed on the other defendants who demanded and received a complete trial by jury. Such result is not uncommon, but receiving a lesser sentence because one pleads guilty is not a matter of right guaranteed by the law of our State. To a slight degree Marando did receive lesser sentences in that he was sentenced on a lesser number of counts and no fine was imposed as was done to the defendant Gibson.

While not an incorporator or officer of Royal National, Marando in selling stock to various investors repeatedly informed them that he was a corporate officer, to wit, a senior vice president, vice president or junior vice president. He signed receipts with these assumed titles. It should further be noted that he had personal contact with the majority of the investors and made the initial contact with at least eight of them. Marando persistently made misrepresentations to the investors as to the stock going public and that the incorporators had invested heavily in the corporation.

It is true that his only monetary benefit from Royal National was from commissions earned, yet there is little if any credible evidence to support his claim that he was under the domination and control of the other defendants. The record on the contrary establishes that he was an aggressive, tireless and persuasive salesman. In considering Marando's culpability, we deem it significant that in 1975 in the State of Indiana he pleaded guilty to the offense of theft by deception and received a suspended sentence of one to five years' probation. While the amount involved in the Indiana offense might well be considered trivial, it demonstrates a propensity to obtain money by illegal means.

We can only conclude that the judgments of guilty entered against the defendant Marando and the sentences imposed thereon should not be disturbed.

During the course of this appeal several motions were filed by the parties which were taken with the case. One was a motion by the defendant Gibson praying for leave to file a reply brief in excess of 27 pages. The State filed a brief to supplement its brief. The ruling of this court on these motions is that the same are allowed.

For the reasons set forth the judgments of guilty of the defendants Whitlow, Brewer, Delfino and Gibson and the sentences and fine imposed thereon by the circuit court of Rock Island County are reversed and vacated. As to these defendants, this case is remanded for a new trial.

As to the defendant Marando, the judgments of guilty entered against him and the sentences imposed thereon are affirmed.

Affirmed in part and reversed in part with directions.

Mr. JUSTICE STOUDER, concurring in the decision:

I concur in the affirmance of the conviction of defendant Marando and the reasons expressed for such affirmance, and since Judges Scott and Barry agree that counts II through V state a cause of action, and since I agree with Judge Scott that the conduct of the prosecution warrants a new trial, I concur in the reversal and remandment with respect to the other defendants. However, I am not convinced that counts II through V state an offense. These counts charge the defendants with violations of the Illinois Securities Law of 1953 (Ill. Rev. Stat. 1973, ch. 121½, pars. 137.12(F), (G), (I)). The problem arises because these counts fail to allege specific intent. If the provisions are absolute-liability provisions, then this failure does not affect the validity of these charges. If the provisions are not absolute-liability provisions, then the failure to allege specific intent is fatal to the indictment and the charges must be dismissed.

The Illinois Criminal Code states that an offense is an absolute-liability offense when "the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described." (Ill. Rev. Stat. 1973, ch. 38, par. 4—9.) Thus, we must determine whether there was legislative intent to impose absolute liability in criminal cases under section 12. I believe there was none.

The language of sections 12(F), (G) and (I) are virtually identical with the antifraud provisions of the Federal Securities Act of 1933 (15 U.S.C. §77g), and therefore I believe that the standards applicable to the Federal act are equally applicable to the Illinois act. It is well established that under the Federal antifraud provisions there must be specific intent to defraud. (*Sparrow* v. *United States* (10th Cir. 1968), 402 F.2d 826; *Frank* v. *United States* (10th Cir. 1955), 220 F.2d 559; *Troutman* v. *United*

States (10th Cir. 1938), 100 F.2d 628.) Therefore, I believe that, to charge the defendants with fraud, the government must allege an intent to defraud or, at the very least, scienter.

Judges Scott and Barry apparently conclude that the statute is an absolute-liability statute, and *Home Indemnity Co.* v. *Reynolds & Co.* (1962), 38 Ill. App. 2d 358, 187 N.E.2d 274, is cited as authority for this position. However, *Home Indemnity Co.* is a civil case, not a criminal case. While I would agree that the statute calls for absolute liability in a civil case, there is no evidence that the legislature intended it to be so in a criminal case. In the absence of a clear intent to make it an absolute-liability provision, it cannot be so considered.

The majority further states that, regardless of whether or not the indictment needed to allege specific intent, there is precedent to the effect that it is sufficient if the intent is proved and the jury charged that finding is essential and a requisite to the conviction. The majority cites *Tallman* v. *United States* (7th Cir. 1972), 465 F.2d 282, and *People* v. *Vraniak* (1955), 5 Ill. 2d 384, 125 N.E.2d 513, for this proposition. Neither case is apposite.

In *Tallman* the defendant failed to object to the indictment prior to trial and was collaterally attacking it. The court there held that where the intent was proved and the jury properly instructed, the indictment could not be collaterally attacked. In the instant case, there was a timely motion to dismiss the indictment. Because it failed to alleged specific intent, the indictment should have been dismissed at that time. Therefore, whether or not intent was later proved and the jury properly charged is irrelevant.

In *Vraniak* the defendant moved to dismiss the indictment for failing to allege intent. The court denied the motion, saying that the offense the defendant was charged with did not require intent. Since the offense in the instant case requires intent, *Vraniak* is clearly inapposite.

Therefore, since the indictment needed to allege specific intent and did not, the defendants' motion to dismiss it should have been granted. It is for this reason that I would simply reverse the lower court's decision.

Mr. JUSTICE BARRY, dissenting:

I respectfully dissent from the majority's reversal of the convictions of the defendants, Whitlow, Brewer, Delfino and Gibson. I disagree with the conclusion of the majority that the alleged misconduct, which is comprised of various statements made by the prosecutor in opening and closing arguments and the prosecutor's actions, otherwise mandates a reversal and remandment for a new trial.

This was a well-handled extended trial complicated by five defendants being tried together and represented by different attorneys. The alleged prejudicial conduct and comments of the prosecutor occurred in the context of a very lengthy, hotly contested and hard-fought trial. As emotions rise in the heat of such a trial the likelihood of injudicious and even unfair conduct or comment occurring is great. However, convictions are not reversed simply because either or both sides made a few comments which would have been better not made. (*People* v. *Harris* (1975), 33 Ill. App. 3d 600, 338 N.E.2d 129.) Not every improper conduct or argument should result in reversal of a conviction.

As the Illinois Supreme Court has stated, " 'Where it appears that improper remarks do not constitute a material

factor in the conviction * * * the verdict will not be disturbed.' *People* v. *Berry* (1960), 18 Ill.2d 453, 458." (*People* v. *Dukett* (1974), 56 Ill. 2d 432, 443, 308 N.E.2d 590, 596.) A reviewing court will reverse a conviction only if it determines that the verdict would have been different had the objectionable conduct or remarks not occurred. (*People* v. *Hastings* (1979), 72 Ill. App. 3d 816, 390 N.E.2d 1273.) I have reviewed the lengthy record and do not find that the comments and conduct were of such substantial magnitude as to warrant a new trial in this case. The allegedly improper conduct and comments did not substantially prejudice the defendants, nor did they constitute, either individually or collectively, a material factor from which the convictions resulted.

The evidence of guilt was overwhelming, and the briefs of some of the defendants suggest the guilt of others. Any effect of the complained-of conduct and comments upon the jury was insignificant and did not result in prejudicing the defendants or in depriving them of a fair trial.

As has often been said, defendants cannot expect a perfect trial. I do not believe the argued conduct or comments influenced the jury in returning the guilty verdicts. "Where there is clear and convincing evidence of guilt, such comments will not require a reversal where it does not appear that they prejudicially influenced the jury or that the verdict would have been otherwise had the remarks not been made." *Harris*, 33 Ill. App. 3d 600, 605, 338 N.E.2d 129, 133.

I find no reversible error and would affirm the judgments of conviction.

APPENDIX 3

IN THE CIRCUIT COURT
OF THE
FOURTEENTH JUDICIAL CIRCUIT
Rock Island County, Illinois

The People of the State of Illinois

vs.

FOREST P. WHITLOW, JOHN L. BREWER, JOSEPH P. DELFINO, TRUMAN K. GIBSON, JR., and and JAMES F. MARANDO

INDICTMENT FOR

VIOLATION OF ILLINOIS SECURITIES (Six Counts)

THEFT (Six Counts)

A TRUE BILL

Signature Illegible

Foreman of the Grand Jury

WITNESSES:

Bernard Hoffman
Charles Clark
Percy Streeter
Opel Stephens
Kenneth Hughes
Carl Kran
Joseph Besse

Bail required in the sum of $10,000.00 each

Caplas will issue instanter

Joseph (illegible)
JUDGE

Filed this 21st day of MAY A.D. 1976.

.....
Clerk of said Court

STATE OF ILLINOIS)
) SS
COUNTY OF ROCK ISLAND)

IN THE CIRCUIT COURT OF THE
FOURTEENTH JUDICIAL CIRCUIT

MAY GRAND JURY 1976

76CF180

(Filed May 21, 1976)

COUNT I.

The Grand Jurors, chosen, selected and sworn in and for the County of Rock Island, in the name and by the authority of the People of the State of Illinois, upon their oaths do present that from on or about February 1973, through on or about July, 1973, the exact dates being to the Grand Jury unknown, in Rock Island County,

Forest P. Whitlow
John L. Brewer
Joseph P. Delfino
Truman K. Gibson, Jr.
James Marando

defendants herein, did commit the offense of conspiracy in that they, with intent that the offense of violating Sections 12 & 14 of the Illinois Securities Law take place, did agree with each other to commit the offense of violating sections 12 and 14 of the Illinois Securities Law (Chapter 121½ Secs. 137.12 & 137.14 Ill. Rev. Stat. 1973) by selling and causing to be sold stock in the Royal National Investment and Mortgage Corporation by means of untrue statements of material facts and deliberate omissions to state material facts necessary in order to make the statements made, not misleading; and that in fur-

therance of said agreement, certain acts were performed, including but not limited to the following:

1. The opening of a bank account number 6195930 in the name of Royal National Investment & Mortgage Corporation at the State Bank of East Moline on or about March 13, 1973 by the defendants Whitlow, Brewer, and Delfino.

2. That on or about May 8, 1973 check #1031 was drawn on the account of the Royal National Investment & Mortgage Corporation in the amount of $5,000, made payable to John L. Brewer and signed by the defendants Joseph P. Delfino, Forest P. Whitlow, and John L. Brewer.

3. That on or about May 28, 1973 check #1057 was drawn on the account of the Royal National Investment & Mortgage Corporation in the amount of $3,000.00, made payable to John L. Brewer and signed by the defendants Joseph P. Delfino, Forest P. Whitlow, and John L. Brewer.

4. That on or about June 1, 1973 check #1059 was drawn on the account of the Royal National Investment & Mortgage Corporation in the amount of $5,000.00, made payable to Forest P. Whitlow.

5. That on or about July 10, 1973 check #1105 was drawn on the account of the Royal National Investment & Mortgage Corporation in the amount of $2,500.00, made payable to Forest P. Whitlow and signed by the defendants John L. Brewer and Forest P. Whitlow.

6. That on or about May 26, 1973 check #1050 was drawn on the account of the Royal National Investment & Mortgage Corporation in the amount

of $5,000.00, made payable to Joseph P. Delfino and signed by John L. Brewer, Forest P. Whitlow and Joseph P. Delfino.

7. That on or about July 14, 1973 check #1110 was drawn on the account of the Royal National Investment & Mortgage Corporation in the amount of $5,000.00, made payable to Joseph P. Delfino.

8. That on or about June 11, 1973 check #1064 was drawn on the account of the Royal National Investment & Mortgage Corporation in the amount of $2,500.00, made payable to Truman K. Gibson, Jr. and signed by John L. Brewer, Forest P. Whitlow, and Joseph P. Delfino.

9. That on or about July 30, 1973 check #1134 was drawn on the account of the Royal National Investment & Mortgage Corporation in the amount of $5,000.00, made payable to Truman K. Gibson, Jr. and signed by Forest P. Whitlow and John L. Brewer.

10. That on or about June 18, 1973 check #1071 was drawn on the account of the Royal National Investment & Mortgage Corporation in the amount of $1,200.00, made payable to James Marando and signed by John L. Brewer, Joseph P. Delfino, and Forest P. Whitlow.

11. That on or about July 13, 1973 check #1109 was drawn on the account of the Royal National Investment & Mortgage Corporation in the amount of $1,000.00, made payable to James Marando and signed by Forest P. Whitlow and John L. Brewer.

12. The opening of a bank account number 617-441-9 at the Lake Shore National Bank in the name of Royal National Investment & Mortgage Corporation on or about March 7, 1973 by the defendants John L. Brewer, Truman K. Gibson, Jr., Forest P. Whitlow, and Joseph P. Delfino.

All in violation of Section 8-2(a), Chapter 38 of Ill. Rev. Stat. (1973).

COUNT II.

The Grand Jurors, chosen, selected and sworn in and for the County of Rock Island, in the name and by the authority of the People of the State of Illinois, upon their oaths do present that from on or about May 1973 to on or about July 1973, at and within the said County of Rock Island and State of Illinois

Forest P. Whitlow
John L. Brewer
Joseph P. Delfino
Truman K. Gibson, Jr.
James Marando

defendants herein committed the offense of violation of the Illinois Securities Law, in that they knowingly obtained money and property through the sale of securities by means of untrue statements of material facts; by knowingly selling and causing to be sold stock issued by the Royal National Investment and Mortgage Corporation, an Illinois Corporation of which Forest P. Whitlow was chairman of the board; John L. Brewer was the president and a director; Joseph P. Delfino was the executive vice-president and a director; Truman K. Gibson, Jr., was the secretary, the treasurer, and a director; and James

Marando was a commissioned salesman; and by making the following untrue statements of material facts, among others:

1. That the proceeds from the sale of stock of the Royal National Investment & Mortgage Corporation would be invested in a scholarship search company.

2. That the proceeds from the sale of stock of the Royal National Investment & Mortgage Corporation would be invested in a sludge waste program.

3. That the proceeds from the sale of stock of the Royal National Investment & Mortgage Corporation would be invested in a Bahamian housing program.

4. That none of the officers of the Royal National Investment & Mortgage Corporation would receive compensation from Royal National Investment & Mortgage Corporation.

5. That Royal National Investment & Mortgage Corporation stock would begin trading publicly and at $5.00 per share.

6. That the officers had each invested $50,000.00 in Royal National Investment & Mortgage Corporation.

All in violation of the Illinois Statutes, ch. 121½ § 137.12 (G) (1973).

COUNT III.

The Grand Jurors, chosen, selected and sworn in and for the County of Rock Island, in the name and by the authority of the People of the State of Illinois, upon their

oaths do present that from on or about May 1973 to on or about July 1973, at and within the said County of Rock Island and State of Illinois

Forest P. Whitlow
John L. Brewer
Joseph P. Delfino
Truman K. Gibson, Jr.
James Marando

defendants herein committed the offense of violation of the Illinois Securities Law, in that they knowingly obtained money and property through the sale of securities by means of deliberate omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; by knowingly selling and causing to be sold stock issued by the Royal National Investment & Mortgage Corporation, an Illinois Corporation, of which Forest P. Whitlow was the chairman of the board; John L. Brewer was the president and a director; Joseph P. Delfino was the executive vice-president and a director; Truman K. Gibson, Jr., was the secretary, the treasurer, and a director; and James Marando was a commissioned salesman; and by omitting to state the following material facts among others:

1. That in excess of 50 percent of all proceeds from the sale of Royal National Investment & Mortgage stock went to the defendants Whitlow, Brewer, Delfino, Gibson, and Marando.

2. That none of the defendants invested any money in Royal National Investment & Mortgage Corporation stock.

All in violation of the Illinois Revised Statutes, ch. 121½ § 137.12 (G) (1973).

COUNT IV.

The Grand Jurors, chosen, selected and sworn in and for the County of Rock Island, in the name and by the authority of the People of the State of Illinois, upon their oaths do present that from on or about May 1973 to on or about July 1973, at and within the said County of Rock Island and State of Illinois

Forest P. Whitlow
John L. Brewer
Joseph P. Delfino
Truman K. Gibson, Jr.
James Marando

defendants herein committed the offense of violation of the Illinois Securities Law, in that they engaged in transactions, practices, and courses of business in connection with the sale of stock of the Royal National Investment and Mortgage Corporation, an Illinois Corporation of which Forest P. Whitlow was the chairman of the board; John L. Brewer was the president and a director; Joseph P. Delfino was the executive vice-president and a director; Truman K. Gibson, Jr., was the secretary, the treasurer, and a director; and James Marando was a commissioned salesman; which worked and tended to work a fraud and deceit upon the purchasers thereof, by means of untrue statements of material facts and by means of deliberate omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

Said untrue statements of material facts included but were not limited to the following:

1. That the proceeds from the sale of securities of the Royal National Investment & Mortgage Cor-

poration would be invested in a scholarship search company.

2. That the proceeds from the sale of Royal National Investment & Mortgage Corporation stock would be invested in a sludge waste program.

3. That the proceeds from the sale of Royal National Investment & Mortgage Corporation stock would be invested in a Bahamian housing program.

4. That none of the officers of the Royal National Investment & Mortgage Corporation would receive compensation from Royal National Investment & Mortgage Corporation.

5. That Royal National Investment & Mortgage Corporation stock would begin trading publicly and at $5.00 per share.

6. That the officers had each invested $50,000.00 in Royal National Investment & Mortgage Corporation.

Said deliberate omissions to state material facts included but were not limited to the following:

1. That in excess of 50 percent of all proceeds from the sale of Royal National Investment & Mortgage stock went to the defendants Whitlow, Brewer, Delfino, Gibson, and Mavando.

2. That none of the defendants invested any money in Royal National Investment & Mortgage Corporation stock.

All in violation of the Illinois Revised Statutes, ch. 121½ § 137.12 (F) (1973).

COUNT V.

The Grand Jurors, chosen, selected and sworn in and for the County of Rock Island, in the name and by the authority of the People of the State of Illinois, upon their oaths do present that from on or about May 1973 to on or about July 1973, at and within the said County of Rock Island and State of Illinois

Forest P. Whitlow
John L. Brewer
Joseph P. Delfino
Truman K. Gibson, Jr.
James Marando

defendants herein committed the offense of violation of the Illinois Securities Law, in that they knowingly employed a device, scheme and artifice to defraud in connection with the sale of stock issued by the Royal National Investment and Mortgage Corporation, an Illinois Corporation of which Forest P. Whitlow was the chairman of the board; John L. Brewer was the president and a director; Truman K. Gibson, Jr., was the secretary, the treasurer, and a director; and James F. Marando was a commissioned salesman by means of untrue statements of material facts and deliberate omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

Said untrue statements of material facts included but were not limited to the following:

1. That the proceeds from the sale of stock of the Royal National Investment & Mortgage Corporation would be invested in a scholarship search company.

2. That the proceeds from the sale of stock of the Royal National Investment & Mortgage Corpo ration would be invested in a sludge waste program.

3. That the proceeds from the sale of stock of the Royal National Investment & Mortgage Corporation would be invested in a Bahamian housing program.

4. That none of the officers of the Royal National Investment & Mortgage Corporation would receive compensation from Royal National Investment & Mortgage Corporation.

5. That Royal National Investment & Mortgage Corporation stock would trade publicly and at $5.00 per share.

6. That the officers had each invested $50,000.00 in Royal National Investment & Mortgage Corporation.

Said deliberate omissions to state material facts included but were not limited to the following:

1. That in excess of 50 percent of all proceeds from the sale of Royal National Investment & Mortgage stock went to the defendants Whitlow, Brewer, Delfino, Gibson, and Marando.

2. That none of the defendants invested any money in Royal National Investment & Mortgage Corporation stock.

All in violation of the Illinois Revised Statutes, ch. 121½ § 137.12 (I) (1973).

COUNT VI.

The Grand Jurors, chosen, selected and sworn in and for the County of Rock Island, in the name and by the authority of the People of the State of Illinois, upon their oaths do present that from on or about February, 1973 through on or about July, 1973, the exact dates being to the Grand Jury unknown, in Rock Island County, Illinois,

Forest P. Whitlow
John L. Brewer
Joseph P. Delfino
Truman K. Gibson, Jr.
James Marando

defendants herein, did commit the offense of conspiracy in that they, with intent that the offense of theft by deception of property over $150.00 in value be committed, did agree with each other, to commit the offense of theft by deception of property over $150.00 in value in connection with the sale of stock of a company known as Royal National Investment and Mortgage Corporation; and that in furtherance of said agreement, certain acts were performed, including but not limited to the following:

1. The opening of a bank account number 6195930 in the name of Royal National Investment & Mortgage Corporation at the State Bank of East Moline on or about March 1973 by the defendants.

2. That on or about May 8, 1973 check #1031 was drawn on the account of the Royal National Investment & Mortgage Corporation in the amount of $5,000.00, made payable to John L. Brewer and signed by the defendants Joseph P. Delfino, Forest P. Whitlow, and John L. Brewer.

3. That on or about May 28, 1973 check #1057 was drawn on the account of the Royal National Investment & Mortgage Corporation in the amount of $3,000.00, made payable to John L. Brewer and signed by the defendants Joseph P. Delfino, Forest P. Whitlow, and John L. Brewer.

4. That on or about June 1, 1973 check #1059 was drawn on the account of the Royal National Investment & Mortgage Corporation in the amount of $5,000.00, made payable to Forest P. Whitlow.

5. That on or about July 10, 1973 check #1105 was drawn on the account of the Royal National Investment & Mortgage Corporation in the amount of $2,500.00, made payable to Forest P. Whitlow and signed by the defendants John L. Brewer and Forest P. Whitlow.

6. That on or about May 26, 1973 check #1050 was drawn on the account of the Royal National Investment & Mortgage Corporation in the amount of $5,000.00, made payable to Joseph P. Delfino and signed by John L. Brewer, Forest P. Whitlow and Joseph P. Delfino.

7. That on or about July 14, 1973 check #1110 was drawn on the account of the Royal National Investment & Mortgage Corporation in the amount of $5,000.00, made payable to Joseph P. Delfino.

8. That on or about June 11, 1973 check #1064 was drawn on the account of the Royal National Investment & Mortgage Corporation in the amount of $2,500.00, made payable to Truman K. Gibson, Jr., and signed by John L. Brewer, Forest P. Whitlow, and Joseph P. Delfino.

9. That on or about July 30, 1973 check #1134 was drawn on the account of the Royal National Investment & Mortgage Corporation in the amount of $5,000.00, made payable to Truman K. Gibson, Jr. and signed by Forest P. Whitlow and John L. Brewer.

10. That on or about June 18, 1973 check #1071 was drawn on the account of the Royal National Investment & Mortgage Corporation in the amount of $1,200.00, made payable to James F. Marando and signed by John L. Brewer, Joseph P. Delfino, and Forest P. Whitlow.

11. That on or about July 13, 1973 check #1109 was drawn on the account of the Royal National Investment & Mortgage Corporation in the amount of $1,000.00, made payable to James F. Marando and signed by Forest P. Whitlow and John L. Brewer.

12. The opening of a bank account number 617-441-9 at the Lake Shore National Bank in the name of Royal National Investment & Mortgage Corporation on or about March 7, 1973 by the defendants John L. Brewer, Truman K. Gibson, Jr., Forest P. Whitlow, and Joseph P. Delfino.

All in violation of Section 8-2(a), Chapter 38, of Illinois Revised Statutes (1973).

COUNT VII.

The Grand Jurors chosen, selected and sworn in and for the County of Rock Island, in the name and by the authority of the State of Illinois, upon their oaths do

present that on or about May 22, 1973, in Rock Island County, Illinois,

Truman K. Gibson, Jr.
Forest P. Whitlow
John L. Brewer
Joseph Delfino

defendants herein, committed the offense of theft by deception in that they knowingly obtained by deception, control over property of Charles Clark to wit: an amount of money exceeding $150.00 belonging to Charles Clark with the intent to deprive Charles Clark permanently of the use and benefit of the property, in violation of Section 16-1b(1), Chapter 38, Illinois Revised Statutes (1973) as amended and against the peace and dignity of the same People of the State of Illinois.

COUNT VIII.

The Grand Jurors chosen, selected and sworn in and for the County of Rock Island, in the name and by the authority of the State of Illinois, upon their oaths do present that on or about June 14, 1973, in Rock Island County, Illinois,

Truman K. Gibson, Jr.
Forest P. Whitlow
John L. Brewer
Joseph Delfino

defendants herein, committed the offense of theft by deception in that they knowingly obtained by deception, control over property of Percy Streeter to wit: an amount of money exceeding $150.00 belonging to Percy Streeter with the intent to deprive Percy Streeter permanently of the use and benefit of the property, in violation of Section

16-1b(1), Chapter 38, Illinois Revised Statutes (1973) as amended and against the peace and dignity of the same People of the State of Illinois.

COUNT IX.

The Grand Jurors chosen, selected and sworn in and for the County of Rock Island, in the name and by the authority of the State of Illinois, upon their oaths do present that on or about June 14, 1973, in Rock Island County, Illinois,

Truman K. Gibson, Jr.
Forest P. Whitlow
John L. Brewer
Joseph Delfino
James Marando

defendants herein, committed the offense of theft by deception in that they knowingly obtained by deception, control over property of Opel Stephens to wit: an amount of money exceeding $150.00 belonging to Opel Stephens with the intent to deprive Opel Stephens permanently of the use and benefit of the property, in violation of Section 16-1b(1), Chapter 18, Illinois Revised Statutes (1973) as amended and against the peace and dignity of the same People of the State of Illinois.

COUNT X.

The Grand Jurors chosen, selected and sworn in and for the County of Rock Island, in the name and by the authority of the State of Illinois, upon their oaths do present that on or about June 20, 1973, in Rock Island County, Illinois

Truman K. Gibson, Jr.
Forest P. Whitlow
John L. Brewer
Joseph Delfino

defendants herein, committed the offense of theft by deception in that they knowingly obtained by deception, control over property of Kenneth Hughes to wit: an amount of money exceeding $150.00 belonging to Kenneth Hughes with the intent to deprive Kenneth Hughes permanently of the use and benefit of the property, in violation of Section 16-1b(1), Chapter 38, Illinois Revised Statutes (1973) as amended and against the peace and dignity of the same People of the State of Illinois.

COUNT XI.

The Grand Jurors chosen, selected and sworn in and for the County of Rock Island, in the name and by the authority of the State of Illinois, upon their oaths do present that on or about June 21, 1973, in Rock Island County, Illinois,

Truman K. Gibson, Jr.
Forest P. Whitlow
John L. Brewer
Joseph Delfino
James Marando

defendants herein, committed the offense of theft by deception in that they knowingly obtained by deception, control over property of Carl Kran to wit: an amount of money exceeding $150.00 belonging to Carl Kran with the intent to deprive Carl Kran permanently of the use and benefit of the property, in violation of Section 16-1b(1), Chapter 38, Illinois Revised Statutes (1973) as amended and against the peace and dignity of the same People of the State of Illinois.

COUNT XII.

The Grand Jurors chosen, selected and sworn in and for the County of Rock Island, in the name and by the

authority of the State of Illinois, upon their oaths do present that on or about July 14, 1973, in Rock Island County, Illinois,

Truman K. Gibson, Jr.
Forest P. Whitlow
John L. Brewer
Joseph Delfino
James Marando

defendants herein, committed the offense of theft by deception in that they knowingly obtained by deception, control over property of Joseph Besse to wit: an amount of money exceeding $150.00 belonging to Joseph Bessee permanently of the use and benefit of the property, in violation of Section 16-1b(1), Chapter 38, Illinois Revised Statutes (1973) as amended and against the peace and dignity of the same People of the State of Illinois.

Signature Illegible

FOREMAN OF THE GRAND JURY

Signature Illegible

STATE's ATTORNEY for Rock Island County

APPENDIX 4

BY MR. DEDONCKER: For the record, in beginning this procedure now that the court reporter is here, Mr. Foreman and ladies and gentlemen of the Grand Jury, this proceeding is done with the cooperation of the Rock Island County States Attorneys Office and the Illinois Attorney General's Office, and Mr. Steven Rosenberg of the Illinois Attorney General's Office is serving as a special assistant for Rock Island County in this case with the consent of William Scott, the Attorney General, and at the request of my office, and let then Mr. Rosenberg to identify the witness and to do the questioning. I would also state for the record, as I believe I told you the first time you appeared as jurors, that under the criminal code we now have and the Grand Jury proceedings we are now proceeding under, you as Grand Jurors have a right to subpoena any witness if you so choose. If the defendant is called they are informed they have the right to be present with an attorney and are not required to testify against themselves, but if they do testify anything they might say may be used against them, and I think that should be stated as a prelude before getting into today's evidence.

MR. ROSENBERG: Thank you Mr. DeDoncker. Once again for the record, my name is Steven J. Rosenberg. I am an Assistant Attorney General for the Illinois Attorney General's Office in the Criminal Division. I will now address my questions to the witness.

Direct Examination by Mr. Rosenberg

Q. Would you please state your name and spell your last name for the record?

A. Bernard Hoffman. H-O-F-F-M-A-N.

Q. Mr. Hoffman, how are you presently employed?

A. I'm an investigator with the Criminal Justice Division, Illinois Attorney General's Office.

Q. How long have you been so employed?

A. For six months.

Q. Prior to that sir?

A. Prior to that I was with the United States Treasury Department, Internal Revenue Service.

Q. In your course of employment in the Attorney General's Office did you have occasion to investigate a company known as Royal National Investment and Mortgage Corporation?

A. Yes I did.

Q. Is that an Illinois Corporation sir?

A. Yes it is.

Q. And can you tell us please when that company was incorporated?

A. In February of 1972.

Q. And do you recall who the incorporators of that company were?

A. Yes, the incorporators were Forest P. Whitlow, John L. Brewer, Joseph P. Delfino, Truman K. Gibson, Jr.

Q. And would you please state their offices?

A. Oh yes. Forest P. Whitlow, Chairman of the Board; John L. Brewer, President; Joseph P. Delfino, Executive Vice President; Truman K. Gibson, Jr., Secretary-Treasurer.

Q. During the course of your investigation did you determine whether or not Royal National Investment and Mortgage Corporation had engaged in a program of selling shares of stock?

A. Yes, the company sold stock from approximately March of 1973 until July of 1973.

Q. And approximately how many shares were sold sir?

A. There were approximately 230,000 shares of stock sold during that period.

Q. Did your investigation determine at what price these shares were sold?

A. They were sold at $1.00 per share.

Q. Did your investigation also reveal that approximately $230,000.00 at least was raised by this offering of stock?

A. That's correct.

Q. Approximately how many individuals were purchasers of the stock?

A. There were approximately twenty investors.

Q. And where were these investors located?

A. Investors were located both in the State of Iowa and the State of Illinois, basically in the Quad Cities area.

Q. Was any individual employed as a salesman for Royal National Investment and Mortgage Corporation stock?

A. Yes, an individual named James Marando.

Q. Now, in the course of your investigation sir, did you have occasion to interview any of the purchasers of Royal National and Mortgage Corporation stock?

A. Yes.

Q. And in the course of those interviews did you determine they had been told particular representations by the defendants?

A. Yes, there were several representations that were made to the investors that I interviewed.

Q. What were they sir?

A. Basically the representations were that each of the officers of the company had invested $50,000.00 in the company.

Q. Was that or was that not true?

A. That apparently is not true. The investors were told that the stock would soon be sold publicly at $5.00 a share.

Q. Was it ever sold publicly?

A. No, never was. The investors were told that the company had an interest in a project which would involve exporting sludge from various East Coast cities in the United States to one of the islands in the Bahamas where the sludge would be processed to be used as fertilizer.

Q. Did that ever take place?

A. That never took place. The investors were also told that condominiums would be constructed in the Bahamas and a job training program would be set up in the Bahamas. They were told that Royal National had investments in companies that were engaged in these activities.

Q. Were they also told anything regarding a scholarship service corporation?

A. Yes, there were also representations made that Royal National had an interest in American Marketing Council which had a program called Scholarship Search which found scholarship money for high school students. Apparently Royal National has no interest in this company.

Q. Did your investigation also determine, Mr. Hoffman, that in fact none of the officers ever had invested any money whatsoever in Royal National Investment and Mortgage Corporation stock?

A. That is correct. Our investigation indicates that no money was invested by the officers. They did make out promissory notes for stock at ten cents a share rather than the $1.00 a share it was sold.

Q. Was any money paid pursuant to those promissory notes?

A. No money was ever paid.

Q. Were investors told that?

A. No, investors were not told that.

Q. Were investors told that at least 50 and probably more than 50 per cent of all the proceeds collected through

the sale of stock was going to the officers and Mr. Marando?

A. No, the investors were never told that.

Q. Did your investigation also determine what amounts the individual officers and Mr. Marando received?

A. Yes, the individual officers and Mr. Marando received over $135,000.00.

Q. How was that broken down sir, approximately?

A. Well approximately $8,000.00 was paid to Mr. Marando and a total of approximately, well approximately $34,000.00 was paid to Mr. Gibson, $33,000.00 to Mr. Brewer, $35,000.00 to Mr. Whitlow and approximately $25,000.00 to Mr. Delfino.

Q. Did Royal National Investment and Mortgage Corporation have any income other than the proceeds from the sale of the stock?

A. No other income, no revenues.

MR. ROSENBERG: I have no further questions at this time. Do any of you have any questions?

JUROR: Can it be shown that these dealings were made in the State of Illinois either personally or through this office?

MR. ROSENBERG: I think I can clear that up with this question. Could you identify please the investors from the State of Illinois?

WITNESS: Yes, certainly. The investors from the State of Illinois were John J. Potter, and I can give you the amount that was invested and the date it was invested if you like.

MR. ROSENBERG: Surely.

WITNESS: John J. Potter on March 7, 1973, $10,000.00; Norman and Myre Ore on March 7, 1973, $10,000.00; Donald Duggleby on March 20, 1973, $10,000.00; Dr. Charles Clark on May 23, 1973, $10,000.00; Opal Stevens on June 15, 1973, $10,000.00; P. H. Streeter on June 15,

1973, $10,000.00; Kenneth Hughes on June 21, 1973, $10,000.00; Carl A. Kran on June 21, 1973, $10,000.00; Mildred Bessie on July 14, 1973, $20,000.00. There's another Illinois investor Wayne Jennings on May 8, 1973, $10,000.00.

MR. ROSENBERG: Anything else?

JUROR: Were the people that were involved in this from Iowa were they sold their stock in Iowa or were they sold their stock in Illinois?

WITNESS: The people from Iowa were solicited both in Iowa and at the Royal National Office in East Moline. The actual transactions several of them occurred in Iowa and several occurred in East Moline. Apparently all the monies paid were placed in the East Moline State Bank or in one or two cases the Lake Shore National Bank in Chicago.

MR. ROSENBERG: Anything else?

JUROR: What evidence do you have the salesman was involved. The salary he received was much lower. How do you know he was part of the con?

MR. ROSENBERG: Let me ask a particular question of the witness and perhaps we can clear that up. As to Mr. Marando, Mr. Hoffman, did you interview any particular investors who had been sold by Mr. Marando?

WITNESS: Yes, I would say at least seven or eight investors that had been sold by Mr. Marando.

MR. ROSENBERG: Do you recall any specific misrepresentations that they told you he made to them?

MR. HOFFMAN: Yes. The misrepresentations that I enumerated before were, apparently the same ones were made by Mr. Marando to every investor he spoke to, basically the fact that $50,000.00 was invested by each officer, and that the stock was soon to go public, and the various ventures in the Bahamas, and the scholarship search fund.

MR. ROSENBERG: Mr. Marando was strictly a commissioned salesman, was he not?

MR. HOFFMAN: Apparently he was, yes.

MR. ROSENBERG: And he did not have a regular salary as did the others coming from Royal National?

MR. HOFFMAN: No he did not.

JUROR: He wasn't on the Board of Directors was he?

MR. HOFFMAN: No, Mr. Marando? No, he was not an officer and not on the board.

MR. DEDONCKER: In the first six counts that are violations of the Illinois Securities Act five defendants are named and the four in the counts of theft Mr. Marando is not named as a defendant in those counts.

MR. ROSENBERG: He is named as a defendant in some of those counts.

MR. DEDONCKER: Oh, in the ones he dealt with specifically?

MR. ROSENBERG: Yes, in the ones he dealt with specifically.

JUROR: Is this corporation required to file any type of tax reports or federal or state financal statements or anything?

MR. ROSENBERG: As a corporation you are required to make an annual report under the Illinois Business Corporation Act. Whether they did or not we don't know. That particular inquiry was not germane to our interest, but the question is certainly proper. We don't know the answer to that question.

JUROR: This stock never purchased any stock in any other corporation?

MR. ROSENBERG: The records do not disclose any of those expenditures, is that not correct?

MR. HOFFMAN: Yes, that's correct. It does remind me of one I may not have included. An additional amount paid to one of the officers which was for a transaction

which apparently is not the proper stock transaction. There's $25,000.00 paid to Mr. Gibson for apparently for an interest in a company, but there is no such company. The company does not exist at present and had no assets at the time and had no book value so in effect that was an additional payment to one of the officers which I did not include in that other breakdown of the amounts paid to officers. Actually it was $25,000.00 more paid to one of the officers.

JUROR: Did the rest of the money, did Mr. Marando get into the entertainment or anything of the rest of the money? There was $135,000.00 left out of a quarter of a million. Did Mr. Marando get anything besides the $6,000.00?

MR. ROSENBERG: I believe Mr. Hoffman, that Mr. Marando was responsible for certain of the expenses of the company, wasn't he sir?

MR. HOFFMAN: Yes, apparently he was.

MR. ROSENBERG: Perhaps it would clear certain matters up if you would read the breakdown of the expenditures as between the $135,000.00 which we know went to Mr. Marando and the officers and directors and the balance of the funds that were collected.

MR. HOFFMAN: Okay. The firm purchased office equipment which amounted to close to $7,000.00. They disbused for expenses some $52,000.00. Now, these expenses included, some of the larger items were commission, the commission paid to Mr. Marando, rent of over $10,000.00. There were two office locations in Chicago and East Moline, over $12,000.00, in travel, lodging, airlines, meals, $3,200.00 in wages paid to office employees, secretarial employees, some $3,000.00 in accounting and legal fees and nearly $6,000.00 in various state and federal taxes paid. There was also advertising and promotions of a $2,000.00 item, $7,500.00 for telephone bills, administrative

and office supplies nearly $2,000.00. There is another item, a loan made to the American Marketing Council of $25,000,00. Now Royal National does hold the promissory note signed by Mr. Freed of American Marketing Council. Apparently Mr. Freed had refused to pay this note.

MR. ROSENBERG: Anything else? To simply re-emphasize, not one of the expenditures you have mentioned was for any of the purposes told to the investors the money would be used for, is that correct?

MR. HOFFMAN: That's correct.

MR. ROSENBERG: I have nothing further. If there's nothing further from you people we will excuse ourselves.

FOREMAN: No other witnesses?

MR. ROSENBERG: No.

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JUL 26 1982
ALEXANDER STEVAS
Clerk

No. 81-2185

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

TRUMAN K. GIBSON, JR.,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To
The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether any federal constitutional requirement mandates this court or any state court to inquire into the sufficiency of evidence used in grand jury proceedings.

II.

Whether the indictment in this case was based on evidence of criminal conduct.

III.

Whether the issue concerning the propriety of the prosecutor's decision to seek a grand jury indictment rather than to proceed by way of information is properly before this Court where said issue was not properly raised during the state court proceedings in this case.

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In The

Supreme Court of the United States

October Term, 1981

TRUMAN K. GIBSON, JR.,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Illinois in *People v. Whitlow*, 89 Ill.2d 322 (1982), can be found in petitioner's appendix 1. The opinion of the Illinois Appellate Court, Third District in *People v. Whitlow*, 86 Ill. App. 3d 858 (3rd Dist. 1980), can be found in petitioner's appendix 2.

JURISDICTION

The jurisdictional requisites have been adequately set forth in the Petition for Writ of Certiorari. However, as treated more fully within this Brief in Opposition, the respondent submits that the petitioner has not shown any compelling reason for this Court to exercise its sound judicial discretion and grant the requested Writ of Certiorari.

STATEMENT OF FACTS

Respondent adopts the statement of facts contained in the Illinois Supreme Court opinion and incorporates those facts by reference herein. (*See* Petition for Writ of Certiorari, Appendix 1, at 1-3).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I.

THERE IS NO CONSTITUTIONAL REQUIREMENT APPLIED TO THE STATES THAT MANDATES THIS COURT OR ANY STATE COURT TO INQUIRE INTO THE SUFFICIENCY OF EVIDENCE USED IN GRAND JURY PROCEEDINGS.

Petitioner seeks review of the Illinois Supreme Court's judgment and opinion upholding the Appellate Court's refusal to reverse his conviction outright asserting that the State abused the grand jury process by obtaining an indictment against him without presenting any evidence of criminal conduct to the grand jury. Petition for Writ of Certiorari at 8-15. Specifically, petitioner contends that the Illinois Supreme Court's ruling that a court should not inquire into the adequacy of evidence presented to a grand jury is contrary to the generally accepted principles governing grand jury proceedings. The respondent submits that the Petition for Writ of Certiorari is improperly brought upon this basis because no novel federal question or "special or important reasons"[1] mandating review have been raised by petitioner. Moreover, the respondent maintains that the Supreme Court of Illinois properly applied the correct standard set forth by this Court in deciding whether it is proper to review the adequacy of evidence presented to a grand jury for purposes of indictment.

Petitioner's contentions notwithstanding, the correct and generally accepted standard was applied by the Illi-

[1] Rule 17, *Rules of the Supreme Court of the United States.*

nois court as first set forth in *Costello v. United States*, 350 U.S. 359 (1956). There, this Court held that:

> An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.

Costello v. United States, 350 U.S. at 363 (footnote omitted). Indeed, it must be remembered that a grand jury proceeding "is an ex parte investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person." *United States v. Calandra*, 414 U.S. 338, 343-344 (1974). This Court reaffirmed the *Costello* rule in *United States v. Dionisio*, 410 U.S. 1 (1973), wherein it was stated:

> A grand jury has broad investigative powers to determine whether a crime has been committed and who has committed it. The jurors may act on tips, rumors, evidence offered by the prosecutor, or their own personal knowledge.

410 U.S. 1 at 15.

Since it is not a proceeding to determine the guilt or innocence of a defendant, any possible prejudice resulting from an invalid indictment disappears when a constitutionally valid trial jury later finds the accused either innocent or guilty beyond a reasonable doubt. *Rose v. Mitchell*, 443 U.S. 545, 575 (1979) (Stewart, J., concurring). Consistent with this rationale, this Court has never required that an indictment be quashed because it was supported in part by incomplete evidence (*Costello v. United States, supra*; *Holt v. United States*, 215 U.S. 245 (1910)), nor is a defendant entitled "to judicial oversight or review of the decision to prosecute." *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975). The willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the "grand jury's relationship to the courts and its historical role of pro-

tecting individuals from unjust prosecution." *Gerstein v. Pugh, supra*; *United States v. Calandra*, 414 U.S. at 342-346. In this regard, this Court has considered the grand jury to be:

> [A] primary security to the innocent against hasty, malicious and oppressive prosecution; it serves the invaluable function in our society of standing between the accuser and the accused, . . . , to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.

Wood v. Georgia, 370 U.S. 375, 390 (1962).

That the standard developed by these cases was applied in the case at bar is clear from the Illinois Supreme Court opinion wherein that Court cites to *Costello* and states:

> [T]here are numerous cases to the effect that a court will not inquire into the adequacy of the evidence. (*E.g.*, *People v. Creque* (1978), 72 Ill. 2d 515, 522.) If it were otherwise, "a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment." *Costello v. United States* (1956), 350 U.S. 359, 363, 100 L.Ed. 397, 402, 76 S.Ct. 406, 408-09.

People v. Whitlow, 89 Ill. 2d 322, 331 (1982).

The petitioner cites no case in which a state grand jury process has been held unconstitutional for complying with this standard. Petitioner instead relies on several federal Courts of Appeals cases to support his contention that the grand jury process was abused in the instant case. Respondent maintains that petitioner's reliance on these cases is misplaced given the well-established rule of law that:

> The principles which evolved on the basis of decisional law dealing with appeals within the federal

> court system are not, of course, necessarily based on any constitutional principle. Where they are not, *the States are free to follow or to disregard them so long as the state procedure as a whole remains consistent with due process of law.* See *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). (Emphasis added)

Fletcher v. Weir, ... U.S. ....., 102 S.Ct. 1309, 1311 (1982). In other words, the evidentiary requisites of state grand jury proceedings do not have to abide by the supervisory mandates of the various federal courts of appeals. Nor are petitioner's creatively cited "general principles based upon the essential requirement of probable cause" (Petition at 12), sufficient to justify judicial review of the grand jury process where no review has been required by this Court. *Cf. People v. Rodgers*, 98 Ill. App. 3d 999 (2d Dist. 1981), *Petition for Leave to Appeal Allowed*, November 30, 1981, Docket Nos. 55561 and 55595 (where an indictment is valid on its face a trial court is precluded from reviewing evidence presented to a grand jury).

II.

THE GRAND JURY INDICTMENT IN THIS CASE WAS BASED ON EVIDENCE OF CRIMINAL CONDUCT.

Petitioner bases his argument that his indictment was invalid on his assertion that it was not supported by *any* evidence of criminal conduct. Petitioner supports this assertion by citing a number of federal cases which have held that an indictment based on no evidence of criminal conduct should be dismissed. Respondent maintains that petitioner's assertion that his indictment was not based on evidence of criminal conduct is unfounded.

That there was sufficient evidence presented to the grand jury is clear from the Illinois Supreme Court opinion wherein that Court states:

> A review of the grand jury transcript indicates that evidence was presented from which defendants' illegal conduct could be inferred.

People v. Whitlow, 89 Ill.2d at 331. Respondent submits that this factual determination made by the Illinois Supreme Court is dispositive and that the evidence adduced at the grand jury hearing supports a probable cause finding that petitioner engaged in illegal conduct. (*See generally* petitioner's Appendices 3 and 4)

III.

THE ISSUE CONCERNING THE PROPRIETY OF THE PROSECUTOR'S DECISION TO SEEK A GRAND JURY INDICTMENT RATHER THAN TO PROCEED BY WAY OF INFORMATION IS NOT PROPERLY BEFORE THIS COURT SINCE SAID ISSUE WAS NOT PROPERLY RAISED DURING THE STATE COURT PROCEEDINGS IN THIS CASE.

The Illinois Supreme Court opinion, in enumerating the issues raised by the petitioner and his co-defendants in the state courts, states the issues on appeal as follows: "(1) Was the grand jury process abused? (2) Should the indictment be held void? (3) Was the evidence insufficient to support the jury's guilty verdict?" *People v. Whitlow*, 89 Ill. 2d at 329. In his Petition for Writ of Certiorari petitioner raises, for the first time, the issue of whether a prosecutor's decision to seek criminal charges by means of a grand jury rather than through a preliminary hearing violates his right to equal protection of the law.[2] By failing to properly raise this claim in the lower courts petitioner is precluded from raising it

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[2] This issue was alluded to in a short, two-sentence, footnote in petitioner's brief in the Illinois Supreme Court (Brief at 72). However, no citation to any authorities was made and the footnote specifically noted that "this Court [the Illinois Supreme Court] need not reach the issue in this case. . . ."

before this Court, since this Court's review is limited to specific federal questions that were properly raised in the state courts. *Whitney v. California*, 274 U.S. 357, 362-363 (1926); *Dewey v. Des Moines*, 173 U.S. 193, 197-198 (1899); *Wilson v. Cook*, 327 U.S. 474, 483-484 (1945); *Adler v. Board of Education*, 342 U.S. 485, 496 (1952).

CONCLUSION

For the foregoing reasons, the People of the State of Illinois request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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